TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. 108.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN J. O'BRIEN, INDIVIDUALLY AND AS A MEMBER OF THE FIRM OF PERKINS & O'BRIEN; AND STEPHEN FARRELLY AS ANCILLARY RECEIVER OF THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY, OF PHILADELPHIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED DECEMBER 4, 1909.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 303.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN J. O'BRIEN, INDIVIDUALLY AND AS A MEMBER OF THE FIRM OF PERKINS & O'BRIEN; AND STEPHEN FARRELLY AS ANCILLARY RECEIVER OF THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY, OF PHILADELPHIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES, PLAINTIFF IN ERROR (PLAINTIFF below),

vs.

JOHN J. O'BRIEN, INDIVIDUALLY, &C., AND STEPHEN FARRELLY, as ancillary receiver, &c., defendants in error (defendants below).

Transcript of record.

Error to the Circuit Court of the United States for the Southern District of New York.

1 *Writ of error.*

UNITED STATES OF AMERICA *ss:*

The President of the United States of America, to the judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, against Seth Perkins, John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United Circuit Court of Appeals, for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 15th day of May, 1908, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to
2 correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of April,
[L. S.] in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-second.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

C. M. HOUGH,
U. S. Circuit Judge.

(Endorsed): The U. S. Circuit Court of Appeals for the Second Circuit. The United States, plaintiff in error, *vs.* John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Co., of Philadelphia, defendant in error. Writ of error. Henry L. Stimson, U. S. atty., attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 17th day of April, 1908. F. J. Swift, attorney for Defendant in Error Farrelly and on behalf of Deft. O'Brien. U. S. Circuit Court, Southern District of New York. Filed Apr. 21, 1908. John A. Shields, clerk.

3 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, plaintiff in error, against John J. O'Brien, individually and as a member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 24th day of April, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

JOHN A. SHIELDS, *Clerk.*

4 United States Circuit Court, Southern District of New York.

THE UNITED STATES, PLAINTIFFS,
vs.
SETH PERKINS AND JOHN J. O'BRIEN, INDIVIDUALLY and as members of the firm of Perkins & O'Brien, and the City Trust, Safe Deposit & Surety Company, of Philadelphia, Pa., defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment

will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the city of New
5 York, this 21st day of October, in the year one thousand nine hundred and four.

[SEAL.] (Sgd.) JOHN A. SHIELDS, *Clerk.*

HENRY L. BURNETT,
Plaintiff's Attorney, United States Attorney.

Office and post-office address, U. S. Court & P. O. Building, Borough of Manhattan, New York City.

(Endorsed): United States Circuit Court, Southern District of New York. The United States, plaintiffs, vs. Seth Perkins and John J. O'Brien, individually and as members of the firm of Perkins & O'Brien, and the City Trust, Safe Deposit & Surety Company of Philadelphia, Pa., defendants. Summons with notice. Henry L. Burnett, U. S. attorney, attorney for plaintiff. To the defendants within named: Take notice, That upon default judgment will be taken for the sum of $76,247.85/100 dol'ars in money with interest from the 31st day of December, 1900, besides costs. Henry L. Burnett, U. S. attorney, plaintiff's attorney, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

6 *Complaint.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
vs.
SETH PERKINS AND JOHN J. O'BRIEN, INDIVIDUALLY and as members of the firm of Perkins & O'Brien, and the City Trust, Safe Deposit & Surety Company of Philadelphia, Pa., defendants.

The plaintiffs above named, by Henry L. Burnett, their attorney for the Southern District of New York, complaining of the defendants above named, allege on information and belief, as follows:

First. That at all times hereinafter mentioned the defendants, Seth Perkins and John J. O'Brien, were and still are engaged in the Southern District of New York, as partners, doing business under the firm name of Perkins & O'Brien, and having an office for the transaction of business in the Southern District of New York.

Second. That the defendant, City Trust, Safe Deposit and Surety Co. of Philadelphia, Pa., is a corporation organized and existing under the laws of the State of Pennsylvania, and has an office for the transaction of business in the Southern District of New York.

7 Third. That on or about November 16, 1898, Maj. D. W. Lockwood, Corps of Engineers, United States Army, acting for and on behalf of the United States, entered into a certain contract in writing with the defendants, Seth Perkins and John J. O'Brien, by which said contract the said defendants, Seth Perkins and John J. O'Brien, were to commence and complete certain dredging in Providence River and Narragansett Bay, Rhode Island, in accordance with certain specifications forming a part of said contract, which said contract and specifications are hereto annexed, marked "Exhibit A," and made part of this complaint.

Fourth. That the said defendants, Seth Perkins and John J. O'Brien, commenced the performance of the work as set forth in the said contract and agreed by them to be performed, but the said defendants, Seth Perkins and John J. O'Brien, failed, neglected, and refused to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the said contract.

Fifth. That the plaintiffs have performed all the conditions agreed by them to be performed.

Sixth. That on or about August 28, 1900, Maj. G. W. Goethals was duly and legally appointed successor to the said Maj. D. W. Lockwood.

That, availing himself of the terms of the said contract, dated November 16, 1898, the said Maj. G. W. Goethals, by letter dated December 31, 1900, a copy of which is hereto annexed and marked "Exhibit C," under and with the approval of the Chief of Engineers of the United States Army, did declare the said contract, designated as "Exhibit A," abrogated, null and void, for the reasons, to wit: Because the said defendants, Seth Perkins and John J. O'Brien, failed, neglected, and refused to prosecute faithfully and diligently the work of dredging in accordance with the specifications and

8 requirements of the said contract.

That the said contract was abrogated and declared null and void under that part of "Exhibit A," more particularly marked and designated "Exhibit A1," and included from the words, "If in any event * * * Sec. 3709 of the Revised Statutes of the United States," inclusive.

Seventh. That the said Maj. G. W. Goethals, acting for and on behalf of the plaintiffs, did, after the abrogation of the said contract and in pursuance of law advertise for proposals to complete said work of dredging, which the said defendant, Seth Perkins and John J. O'Brien, failed, neglected, and refused to complete in accordance with the contract and specifications already referred to.

Eighth. That on or about November 16, 1898, simultaneously with the execution of the aforesaid contract, the said defendants, Seth Perkins and John J. O'Brien, as principals, and the defendant City Trust, Safe Deposit and Surety Co., of Philadelphia, Pa., as surety, severally and duly executed their, and each of their, joint and several writing, obligatory, or bond, a copy of which is hereto annexed, marked "Plaintiffs' Exhibit B," and made part of this complaint.

Ninth. That in response to such advertisement for proposals to complete the said work of dredging which was left uncompleted by the said defendants, Seth Perkins and John J. O'Brien, the lowest bidder was the international Dredging Co., to which said last-named company the contract for completing the said dredging was awarded.

That the said International Dredging Co. duly entered into said contract to complete the work of dredging in accordance with the contract and specifications agreed to be performed by the said
9 defendants, Seth Perkins and John J. O'Brien, and the said International Dredging Co. duly performed all the conditions and covenants of the said contract for the completion of the said dredging, and were paid therefor.

Tenth. That by reason of the failure, neglect, and refusal of the said defendants, Seth Perkins and John J. O'Brien, to perform the terms and conditions of the contract agreed by them to be performed, the plaintiffs have been injured to their harm and damage in the sum of seventy-six thousand two hundred and forty-seven dollars and eighty-five cents ($76,247.85), which said sum represents the difference between what the defendants, Seth Perkins and John J. O'Brien, agreed to perform the said work of dredging for, and what the said work of dredging actually cost the plaintiffs to complete the work under the contract with the said International Dredging Co.

Eleventh. That demand in writing has been made upon the said bounden defendants, Seth Perkins and John J. O'Brien, as principals, for the said sum of seventy-six thousand two hundred and forty-seven dollars and eighty-five cents ($76,247.85), and a like demand upon the defendant City Trust, Safe Deposit and Surety Co., of Philadelphia, Pa., as surety, for the payment of the said sum of $76,247.85, but that the same has been refused, and no part or portion thereof has been paid.

Wherefore, the plaintiffs demanded judgment against the defendants, Seth Perkins and John J. O'Brien, as principals, and against the defendant City Trust, Safe Deposit and Surety Co., of Philadelphia, Pa., as surety, and each of them, in the said sum of seventy-
s'x thousand two hundred and forty-seven dollars and
10 eighty-five cents ($76,247.85), together with the costs of this action, with interest thereon from December 31, 1900.

HENRY L. BURNETT,
United States Attorney and Attorney for the Plaintiffs.

(Office and post-office address, Room 50, Post-Office Bldg., New York City, Borough of Manhattan.)

STATE OF NEW YORK,
Southern District of New York, ss:

Arthur M. King, being duly sworn, deposes and says that he is an assistant to the United States attorney for the Southern District of New York; that he has read the foregoing complaint and knows

the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason this verification is not made by the plaintiffs is that they are a corporation sovereign; that the source of deponent's information and belief as to all matters not stated upon deponent's knowledge is based upon official documents and records on file in the office of the War Department of the United States.

ARTHUR M. KING.

Sworn to before me this 22d day of Oct., 1904.

[SEAL.] S. D. EDICK,
Notary Public, Rockland Co.

(Certificate filed in New York Co.)

11 "EXHIBIT A."

Advertisement.

U. S. ENGINEER OFFICE,
Newport, R. I., Sept. 7, 1898.

Sealed proposals for dredging in Providence River and Narragansett Bay, R. I., will be received here until 11 a. m., Oct. 26, 1898, and then publicly opened. Information furnished on application.

D. W. LOCKWOOD,
Major of Engineers.

Specifications.

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

12 4. No proposal will be considered unless accompanied by a guaranty in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office. One copy of the guarantee, if

given with an individual or individuals as surety, must have an internal revenue stamp, or stamps, of the value of fifty cents affixed; if given with a guaranty company as surety, it must have, in addition to a fifty-cent stamp, a stamp or stamps denoting one-half of one cent on each dollar or fractional part thereof, paid by the principal obligor as a premium.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of United States court, United States district attorney, United States commissioner, or judge or clerk of a state court of record, with the seal of said court attached.

7. A firm, as such, will not be accepted as surety nor a partner for a co-partner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties must be citizens of the United States.

8. Each signature to guaranties and bonds shall have affixed to it an adhesive seal. All signatures to proposals, guaranties, contracts and bonds should be written out in full, and each signature to the guaranties, contract, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

9. Each guarantor will justify in the sum of ten thousand (10,000) dollars. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guaranty attached to the bid.

13 10. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm.

11. The place of residence of every bidder, and post-office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

16. Any one signing the proposal as the agent of another or others, must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the pro-
14 posal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guaranties must be placed in a sealed envelope, marked "Proposals for dredging in Providence River and Narragansett Bay, R. I.," and enclosed in another sealed envelope addressed to Major D. W. Lockwood, Corps of Engineers, Newport, R. I. The outer envelope must be so endorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of thirty thousand ($30,000)
15 dollars within ten (10) days after being notified of the acceptance of his proposal. One copy of the bond accompanying the contract must have internal-revenue stamps affixed, in the same way and to the same value as explained in paragraph 5, above.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished if desired to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

29. The contractor should, within ten days from the award of the contract, furnished the office with the post-office address to which communications should be sent.

30. Transfers of contracts, or of interests in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

16 32. The decision of the engineer officer in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves.

34. Payments will be made monthly, when funds are available, ten (10) per cent being reserved until the total amount thus retained is equal to ten (10) per cent of the cost of completing the remainder of the contract as estimated by the engineer officer in charge. When this amount has been retained, no further reservations shall be made from the monthly payments; and the last monthly payment of each fiscal year (except for year ending June 30, 1899) such portion of the total amount retained as will then reduce it to ten (10) per cent of the cost of completing the then remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor. Should payments be discontinued for a period of one year owing to lack of funds, the total amount reserved from previous payments shall be paid to the contractor, it being understood that such payments will in no respect release the contractor from his obligators under this contract, but that the contract and accompanying bond are to remain in full force and virtue the same as if such reserved per centum had not been paid.

35. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due

17 to the contractor; Provided, however, That if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements allow the contractor additional time in writing as provided for in the form of contract: there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided, further, That nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the Army.

36. The work to be performed under the contract to be entered into and the conditions of the contract must be in accord with the river

and harbor act of June 3, 1896, which provides as follows: "Improving Providence River and Narragansett Bay, Rhode Island: Continuing improvement, according to the report of the Chief of Engineers dated April ninth, eighteen hundred and ninety-six, $25,000: Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary for the completion of such project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $707,000, exclusive of the amount herein and heretofore appropriated.

"SECTION 5. That under authority to make contracts for material and work under the provisions of this act in addition to the sums appropriated herein, the Secretary of War shall not obligate the Government to pay in any one fiscal year, beginning July first, eighteen hundred and ninety-seven, more than four hundred thousand dollars upon the said contracts for any one of the works herein placed under the contract system, except as herein otherwise specifically authorized to do:

18 "Provided, any part of the annual allotment herein provided for, not earned and paid for material furnished or work done in one fiscal year, may be paid for material furnished and work done under the contracts in any subsequent year: Provided, further, That nothing herein contained shall be so construed as to prevent the Secretary of War from making contracts for the whole or any part of the works placed under the contract system in such manner as may be deemed best, payments, however, to be made as stated in this section."

37. The amount at present available for the work is $125,000, from which must be provided funds for superintendence and contingencies of the work. The total amount of work under these specifications and for which bids are now invited is estimated at 2,036,491 cubic yards.

38. The work to be done in dredging in Narragansett Bay from a point about 4,500 feet below Conimicut Point to deep water north of Prudence Island, and from Warwick Neck south to near Quonset Point, R. I. The depth of cutting varies from nothing to 9 feet, the material to be removed being 4 to 5 feet of sand and gravel overlying stiff clay.

The foregoing description of material and depth of cut is believed to be fair, but bidders are expected to satisfy themselves concerning these points and no allowance will be made for variations from the above, discovered during the progress of the work.

39. The finished channel is to be 400 feet wide on the bottom and 25 feet deep at mean low water. No allowance will be made for overdepth exceeding one foot, and deductions for overdepths determined from inspector's notes will be made each month.

40. The mean rise and fall of the tide is about 4.7 feet.

19 41. Excavated material will be dumped in not less than 12 fathoms of water east of Prudence Island in Narragansett

Bay, or south of Beaver Tail Light, as the engineer officer in charge may direct.

42. Actual work of dredging must be commenced by the contractor on or before March 1, 1899, and be completed by July 1, 1902. Should operations be suspended awaiting appropriations, the time allowed for completion of contract may be correspondingly extended, and the operation of paragraph 35 of these specifications will be suspended for a similar period.

43. When available funds are exhausted the contractor will be notified and he shall then have the option to continue the work as rapidly as possible under the law and contract, relying upon future appropriations for payment or suspend operations until such appropriations are actually made and available.

44. In case of cessation of suspension of work while awaiting appropriations by Congress, the contractor shall resume work within 30 days after notification that funds are made available for payments for work under the contract.

45. The amount of work done will be measured by the cubic yard in scows. The inspector will measure each scow and determine its capacity when even full; his judgment as to whether any scow load is full or to what extent it is short shall be accepted as final. In estimating the dredging done below grade, if any, the quantity measured in place will be increased by 25 per cent and deducted from the scow measurement.

46. At the beginning of the work, the contractor will see that the number of each scow is conspicuously painted on it.

20 47. No dredging will be done between the hours of sunset and sunrise, nor upon legal holidays or Sundays.

48. The location of work will be marked in advance by the inspector, and tide gauges set to guide dredging as to depth. After this the contractor will be responsible for their maintenance under the inspector's supervision.

49. The contractor must furnish the inspector with a suitable boat, and assistance in taking soundings, or for other work in connection with his duties. He must also, when he supplies his working force with board and lodging, also supply same at a reasonable price for the inspector or inspectors if required, to be paid for by the United States.

50. Any employee of the contractor who shall be guilty of improper acts or unfair work and whose discharge is demanded on such grounds by the engineer officer in charge, shall be at once discharged from the work by the contractor, and shall not again be employed upon it.

51. Care shall be taken by the contractor that regular navigation is interfered with as little as possible. The United States will not be responsible for any accident that may occur to the contractor's plant or passing vessels, or any other property whatever during the progress of the work, and by reason of it.

Proposal for dredging.

NEW YORK, N. Y.,
Oct. 25th, 1898.

To Major D. W. LOCKWOOD,
Corps of Engineers, U. S. A., Newport, R. I.

21 SIR: In accordance with your advertisement of September 7, 1898, inviting proposals for dredging Providence River and Narragansett Bay, R. I., and subject to all the conditions and requirements thereof, and of your specifications of same date, copies of both of which are hereto attached, and so far as they relate to this proposal, are made a part of it, we (or) I propose to furnish the necessary plant and do the dredging required at 10 and 8-10 cents (0.10 8/10) cents per cubic yard.

We (or) I make this proposal with a full knowledge of the work required, and, if it is accepted, will, after receiving written notice of such acceptance, enter into contract within ten days with good and sufficient sureties for the faithful performance thereof.

(Signature) SETH PERKINS.
(Address) *16 City Sq., Charlestown, Mass.*
(Signature) JOHN J. O'BRIEN,
(Address) *258 Broadway, New York.*

(Signed in triplicate.)

Guaranty to accompany proposal.

We, the City Trust, Safe Deposit and Surety Company of Philadelphia, a corporation duly organized under laws of State of Penn., and duly authorized under act of Congress of August 13, 1894, to act as sole surety in the county of and State of , and , of in the county of and State of hereby undertake that if the bid of Perkins & O'Brien herewith accompanying, dated Oct. 25, 1898, for dredging in Providence River and Narragansett Bay, R. I., be accepted as to any or all of the items of supplies, materials, and services proposed to

22 be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefore, the said bidder Perkins & O'Brien will, within ten days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond with good and sufficient sureties for the faithful and proper fulfilment of such contract. And we bind ourselves, our heirs, executors, and administrators, jointly and severally, to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten days after said notice of acceptance, the difference in money between the amount of the bid

of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

Given under our hands and seals this 24th day of Oct., eighteen hundred and ninety-eight.

In presence of

JNO. W. BLISS,

as to THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, *160 Broadway, N. Y.*

as to JNO. A. SULLIVAN, *Vice-President.*

V. H. LAMARCHE, *Asst. Secretary.*

(*Affix adhesive seal.)

(Revenue stamps attached to original.)

23 "EXHIBIT A."

This agreement, entered into this sixteenth day of November, eighteen hundred and ninety-eight, between Major D. W. Lockwood, Corps of Engineers, United States Army, of the first part, and Seth Perkins and John J. O'Brien, partners doing business under the firm name of Perkins and O'Brien, of New York, in the county of New York, State of New York, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major D. W. Lockwood, for and in behalf of the United States of America, and the said Perkins and O'Brien do covenant and agree to and with each other, as follows:

That the said Perkins and O'Brien, parties of the second part, are to furnish the necessary equipment and do all the work or dredging required in improving Providence River and Narragansett Bay, R. I., from a point about 4,500 feet below Conimicut Point to deep water north of Providence Island, and from Warwick Neck south to near Quonset Point, R. I., in accordance with the requirements of the specifications hereunto attached.

In consideration of the parties of the second part performing the required work (removing about 2,036,491 cubic yards of material) the party of the first part agrees to pay the parties of the second part at the rate of ten and eight-tenths (10 8/10) cents per cubic yard, scow measurement.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected.

The decision of the engineer officer in charge as to quality and

24 quantity shall be final.

The said Perkins and O'Brien shall commence work on or before the first day of March, eighteen hundred and ninety-nine

(1899), and shall complete the work on or before the first day of July, nineteen hundred and two (1902).

"EXHIBIT A1."

(If,) in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement of completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project and the change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract; and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

26 The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments shall be made to the said Perkins and O'Brien monthly, based upon amount of material removed, in the manner specially provided for in the specifications.

Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferor or the transferee, but all rights of action for any breach of this contract by said Perkins and O'Brien are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

27 ASA B. KENNAN.

as to D. W. LOCKWOOD,
Major of Engineers.

W. J. MCCORMICK, as to SETH PERKINS.

NELSON H. BARNES, as to JOHN J. O'BRIEN.

(Executed in quintuplicate.)

Approved: December 13, 1898.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

"EXHIBIT B."

Contractor's bond (public works).

(When principal is an individual or a partnership and surety is a corporation.)

Know all men by these presents, that we,[1] Seth Perkins and John J. O'Brien, partners doing business under the firm name and style of Perkins and O'Brien, as principals, and The City Trust, Safe Deposit, and Surety Company of Philadelphia, a corporation existing under the laws of the State of Pennsylvania, as surety, are held and bound unto the United States of America in the penal sum of thirty thousand ($30,000) dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

28 The condition of this obligation is such, that whereas the above-bounden Perkins and O'Brien have on the 16th day of November, 1898, entered into a contract with the United States, represented by Major D. W. Lockwood, Corps of Engineers, U. S. Army, for dredging Providence River and Narragansett Bay, R. I.

Now, therfore, if the above-bounden Perkins and O'Brien, their heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Perkins and O'Brien to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying them[2] labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof the parties hereto have executed this instrument this 18th day of November, 1898, the name and corporate seal of said surety being hereto affixed and these presents duly signed by its vice-president,[3] pursuant to a resolution of its board of directors,[4]

[1] If the principal is a partnership, the individual names of the partners will be given with the recital that they are partners composing a firm, naming it, and the bond must be executed by all the partners.

[2] Him or them.

[3] The president or officer authorized to sign for the corporation.

[4] The board of directors or other governing body of the corporation.

passed on the 10th day of May, 1898, a copy of the record of
29 which is on file in the War Department.

THE CITY TRUST, SAFE DEPOSIT, AND SURETY
COMPANY OF PHILADELPHIA,
160 Broadway, N. Y.

JNO. A. SULLIVAN, *Vice-President.*
V. H. LAMARCHE, *Asst. Secretary.*

In presence of—

BERTON M. LAWLER, as to SETH PERKINS.
P. J. MURRAY, as to JOHN J. O'BRIEN.

Attest:

[CORPORATE SEAL.] V. H. LAMARCHE.

(Executed in duplicate.)

(Endorsed:) U. S. Circuit Court, Southern District of New York. The United States of America, plaintiffs, vs. Seth Perkins and John J. O'Brien, individually, and as members of the firm of Perkins & O'Brien, and the City Trust, Safe Deposit and Surety Company of Philadelphia, defendants. Summons and complaint. Henry L. Burnett, United States attorney.

I hereby certify that on the 28th day of October, 1904, at the city of New York, in my district, I personally served the within summons with notice and complaint upon the within-named defendant, John J. O'Brien, at No. 253 Broadway, room No. 618, New York City, N. Y., by exhibiting to him the within originals, and at the same time leaving with him a copy of each thereof. Wm. Henkel, United States marshal, Southern District of New York. Dated October 28, 1904.

I hereby certify that on the 10th day of November, 1904, at the city of New York, in my district, I served the within sum-
30 mons with notice and bill of complaint upon the within-named defendant, City Trust, Safe Deposit and Surety Company, of Philadelphia, Pa., by exhibiting to Adrian T. Kiernan, as vice-president and manager of said company, at No. 169 Broadway, New York City, the within originals, and at the same time leaving with him a copy of each thereof. Wm. Henkel, United States marshal, Southern District of New York. Dated Nov. 10, 1904. Rec'd corrected complaint. New York, August 1st, '05, Frederic J. Swift, attorney for Surety Co. John W. Browne, per W. R. Conklin, attorney for Perkins, etc.

31 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York in the Second Circuit, held in the United States Circuit Court rooms, in the

[1]Affix adhesive seal. [2]Here affix the corporate seal.

Borough of Manhattan, in the city of New York, on the 13th day of December, 1905.

Present: Hon. John R. Hazel, circuit judge.

THE UNITED STATES, PLAINTIFF,
against
SETH PERKINS AND JOHN J. O'BRIEN, individually and as members of the firm of Perkins & O'Brien, and The City Trust, Safe Deposit and Surety Company, of Philadelphia, Pa., defendants.

Upon reading and filing the affidavit of William R. Conklin, verified the 22d day of November, 1905, asking for the substitution of "Stephen Farrelly, as ancillary receiver of The City Trust, Safe Deposit and Surety Company of Philadelphia," in place of The City Trust, Safe Deposit and Surety Company of Philadelphia as defendants in this action, and the consent of Henry L. Burnett, esq., United States district attorney, attorney for the plaintiff, and John W. Browne, esq., attorney for the defendants Perkins and O'Brien, now, on motion of Frederic J. Swift, esq., it is

32 Ordered that "Stephen Farrelly, as ancillary receiver of The City Trust, Safe Deposit and Surety Company of Philadelphia," be substituted in the place of The City Trust, Safe Deposit and Surety Company of Philadelphia as defendant in the above-entitled action, without prejudice to any of the proceedings heretofore had in this action.

JOHN R. HAZEL, *U. S. J.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
SETH PERKINS AND JOHN J. O'BRIEN, individually and as members of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of The City Trust, Safe Deposit and Surety Company of Philadelphia, defendants.

The defendant Stephen Farrelly, as ancillary receiver of The City Trust, Safe Deposit and Surety Company of Philadelphia, answering the complaint herein by Frederic J. Swift, his attorney, respectfully shows to the court and alleges:

I. Defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the complaint herein, except that the defendant admits

33 that Seth Perkins and John J. O'Brien were, up to January

1st, 1901, copartners doing business under the firm name and style of Perkins & O'Brien.

II. For an answer to the second paragraph of the complaint herein, defendant admits that the City Trust, Safe Deposit and Surety Company, of Philadelphia, was, up to June 24th, 1905, a corporation organized and existing under the laws of the State of Pennsylvania, and that up to January 1st, 1905, it had an office for the transaction of business in the Southern District of New York, but defendant alleges that after January 1st, 1905, it ceased to do business in the State of New York, and gave up its said office in the Southern District of New York, and that on June 24th, 1905, said Surety Company was dissolved by a decree of the Court of Common Pleas of the State of Pennsylvania, and a permanent receiver was appointed for said Surety Company; that on February 7th, 1906, by a judgment entered in the office of the clerk of the county of New York, in the action of John McAnerney against the City Trust, Safe Deposit and Surety Company, of Philadelphia, this defendant was duly appointed permanent ancillary receiver of the said Surety Company, and has qualified as such receiver.

III. Defendant admits the making of the contract between the United States and Perkins and O'Brien, referred to in paragraph third of the complaint herein, but begs leave for greater certainty to refer to the original contract for the exact terms thereof.

IV. Defendant admits the allegations contained in paragraph fourth of the complaint herein, "that the said defendants Seth Perkins and John J. O'Brien commenced the performance of the work set forth in the said contract and agreed by them to be done,"
34 but on information and belief defendant denies all the other allegations contained in paragraph fourth of the complaint herein.

V. Defendant denies the allegations contained in paragraph fifth of the complaint herein.

VI. Defendant admits the allegations contained in paragraph sixth of the complaint herein, "that on or about August 28th, 1900, Major G. W. Goethals was duly and legally appointed successor to the said Major D. W. Lockwood," and "that the said contract was abrogated and declared null and void under that part of Exhibit A more particularly marked and designated as A1, and included from the words 'if in any event * * * section 3709 of the Revised Statutes of the United States,' inclusive."

Defendant denies all the other allegations contained in paragraph sixth of the complaint herein as therein alleged, except those specifically admitted, and begs leave to refer to the original letter of December 31st, 1900, from Major G. W. Goethals to Perkins and O'Brien and the City Trust, Safe Deposit and Surety Company, of Philadelphia, for the exact terms of the annulment of said contract.

VII. Defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs seventh and ninth of the complaint herein.

VIII. Defendant admits the making of the bond referred to in paragraph eight of the complaint herein, but begs to refer to the original bond for the exact terms thereof.

IX. On information and belief defendant denies the allegations contained in paragraph tenth of the complaint herein, and defendant alleges that neither the City Trust, Safe Deposit and
35 Surety Company, of Philadelphia, nor defendant as receiver of said company, is or ever has been indebted to the plaintiff herein in any sum whatsoever on account of said contract and bond of November 16th, 1898.

For a second separate and further answer and defense to the cause of action set forth in the complaint herein, defendant alleges:

1. That the said contract, dated November 16th, 1898, between the United States and Parkins and O'Brien provides:

"(If) in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States: * * *"

2. That Major G. W. Goethals, the engineer in charge of the work under said contract dated November 16th, 1898, by the authority of and with the sanction of the Chief of Engineers of the United States Army, and availing himself of the terms of said contract, by a letter, dated December 31st, 1900, signed by G. W. Goethals, major,
36 Corps of Engineers, U. S. A., and addressed to Perkins and O'Brien and the City Trust, Safe Deposit and Surety Company, of Philadelphia, annulled said contract.

3. That the United States, in accordance with the terms of said contract, retained, and still retains, the reserved percentages due to said Perkins and O'Brien for work done on said contract.

4. That the plaintiff herein has received from the defendants, Perkins and O'Brien, the entire amount due it in accordance with the terms of this contract.

For a third separate and further answer and defense to the cause of action set forth in the complaint herein, defendant alleges on information and belief:

That Major G. W. Goethals, the engineer in charge of the work under said contract dated November 16th, 1898, arbitrarily annulled said contract on December 31st, 1900, notwithstanding the fact that he had previously written the contractors that they could have until January 1st, 1901, in which to have a sufficient plant on the work.

That this action of said Major G. W. Goethals in annulling the contract prevented the contractors, Perkins and O'Brien, from completing said contract. That the loss or damage, if any, which the plaintiff herein has suffered by reason of the annulment of said contract, is due solely to the unreasonable, unjustifiable, and arbitrary action of their own agent in annulling said contract.

For a further answer and partial defense to the cause of action set forth in the complaint herein, defendant alleges:

37 1. That in July, 1900, an action was brought in the United States Circuit Court for the Southern District of New York by the United States of America for the use and benefit of George W. Rogers against Seth Perkins, John J. O'Brien, and the City Trust, Safe Deposit and Surety Company of Philadelphia, on a certain bond in the penal sum of $30,000 issued and executed by the said City Trust, Safe Deposit and Surety Company of Philadelphia on or about November 18, 1898, on behalf of Seth Perkins and John J. O'Brien guaranteeing the performance by said Seth Perkins and John J. O'Brien of a certain contract dated November 18, 1898, between Seth Perkins and John J. O'Brien and Major D. W. Lockwood, Corps of Engineers, U. S. Army, for and on behalf of the United States of America for the dredging of Providence River and Narragansett Bay, Rhode Island, said contract and bond are the contract and bond sued upon in this action, and on February 26th, 1902, judgment was entered in said action in the office of the clerk of the United States Circuit Court for the Southern District of New York in favor of said plaintiff and against the City Trust, Safe Deposit and Surety Company of Philadelphia and Seth Perkins and John J. O'Brien. On October 29th, 1902, the judgment against the City Trust, Safe Deposit and Surety Company of Philadelphia was satisfied by the payment of the sum of $2,707.55 by the City Trust, Safe Deposit and Surety Company to the said plaintiff. That said sum of $2,707.55 was a payment on account of and should be deducted from the amount of the bond given by the Surety Company on said contract, namely, $30,000, being the bond involved in this action, leaving the total possible liability of the Surety Company $27,292.45.

38 Wherefore, defendant demands judgment dismissing the complaint, with costs.

FREDERIC J. SWIFT,
Attorney for Stephen Farrelly, as Receiver of Surety Company.
(Office and post-office address, 160 Broadway, borough of Manhattan, city of New York.)

STATE OF NEW YORK,
County of New York, ss:

Stephen Farrelly, being duly sworn says: That he is the ancillary receiver of The City Trust, Safe Deposit and Surety Company of Philadelphia, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof,

and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

STEPHEN FARRELLY.

Sworn to before me this 21st day of February, 1906.

[SEAL.] WILLIAM R. CONKLIN,
Notary Public, No. 189, New York County.

39 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
SETH PERKINS AND JOHN J. O'BRIEN, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF PERKINS & O'BRIEN, AND STEPHEN FARRELY, AS ANCILLARY RECEIVER OF THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, DEFENDANTS.

The defendant John J. O'Brien for his amended answer to the complaint herein respectfully shows to the court and alleges:

I. Defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph first of the complaint herein, except that the defendant admits that Seth Perkins and John J. O'Brien were, up to about January 1st, 1901, co-partners doing business under the firm name and style of Perkins & O'Brien.

II. Defendant admits the making of the contract between the United States and Perkins & O'Brien, referred to in paragraph third of the complaint herein, but begs leave for greater certainty to refer to the original contract for the exact terms thereof.

III. Defendant admits the allegations contained in paragraph fourth of the complaint herein, "that the said defendants Seth Perkins and John J. O'Brien commenced the performance
40 of the work as set forth in the said contract and agreed by them to be done," but on information and belief defendant denies all other allegations contained in paragraph fourth of the complaint herein.

IV. Defendant denies each and every allegation contained in paragraph fifth of the complaint herein.

V. Defendant admits the allegations contained in paragraph sixth of the complaint herein, "that on or about August 28th, 1900, Major G. W. Goethals was duly and legally appointed successor to the said Major D. W. Lockwood," and "that the said contract was abrogated and declared null and void under that part of 'Exhibit A' more particularly marked and designated as 'A1,'" and included from the words "if in any event * * * section 3709 of the Revised Statutes of the United States inclusive."

Defendant denies all other allegations contained in paragraph sixth of the complaint herein as therein alleged, except those specific-

ally admitted, and begs leave to refer to the original letter of December 31st, 1900, from Major G. W. Goethals to Perkins & O'Brien and the City Trust, Safe Deposit and Surety Company of Philadelphia for the exact terms of the annulment of said contract.

VI. Defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs seventh and ninth of the complaint herein.

VII. On information and belief defendant denies the allegations contained in paragraph tenth of the complaint herein.

For a second separate and further answer and defense to the cause of action set forth in the complaint herein, defendant alleges:

41 1. That the said contract, dated November 16th, 1898, between the United States and Perkins & O'Brien, provides:

"(If) in any event the party of the second part shall delay or fail to commence with the delivery of the materials or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part or his successor legally appointed shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States. * * *"

2. That Major G. W. Goethals, the engineer in charge of the work under said contract dated November 16th, 1898, by the authority of and with the sanction of the Chief of Engineers of the United States Army, and availing himself of the terms of said contract, by a letter dated December 31st, 1900, signed by G. W. Goethals, major, Corps of Engineers, U. S. A., and addressed to Perkins and O'Brien and the City Trust, Safe Deposit and Surety Company, of Philadelphia, annulled said contract.

3. That the United States, in accordance with the terms of said contract, retained, and still retains, the reserved percentage due to said Perkins & O'Brien for work done on said contract.

42 4. That the plaintiff herein has received from the defendants, Perkins & O'Brien, the entire amount due it in accordance with the terms of this contract.

For a third separate and further answer and defense to the cause of action set forth in the complaint herein, defendant alleges on information and belief:

That Major G. W. Goethals, the engineer in charge of the work under said contract dated November 16th, 1898, arbitrarily annulled said contract on December 31st, 1900, notwithstanding the fact that he had previously written the contractors that they could have until January 1st, 1901, in which to have a sufficient plant on to work.

That this action of said Major G. W. Goethals in annulling the contract prevented the contractors, Perkins & O'Brien, from completing said contract. That the loss or damage, if any, which the plaintiff herein has suffered by reason of the annulment of said contract is due solely to the unreasonable, unjustifiable, and arbitrary action of their own agent in annulling said contract; that by reason of the said wrongful acts of the plaintiff in preventing the defendants from performing said contract and wrongfully annulling the same the defendants were greatly injured and damaged and were prevented from earning the moneys, profits, an' retained percentages which they would otherwise have earned and received, said damages amounting in all to the sum of twenty-five thousand four hundred and nine 09/100 dollars, including retained percentages amounting to five thousand four hundred and nine 09/100 dollars, which said damages said defendants hereby counterclaim, same being due when this action was commenced.

43 For a furt*er separate and distinct answer and defense and by way of counterclaim, defendant alleges:

1. That on or about November 16, 1898, one Major D. W. Lockwood, Corps Engineers, United States Army, acting for and on behalf of the United States, made and entered into a certain contract in writing with the defendants, Seth Perkins and John O'Brien, by which said contract the said last-named defendants were to perform certain work, labor, and services, and furnish certain materials in and about certain dredging in Providence River and Narragansett Bay, Rhode Island. A copy of said contract is annexed to the complaint herein, marked "Exhibit A," and made a part of this answer.

II. That the said defendants, John J. O'Brien and Seth Perkins, entered upon the performance of said contract, and between the 16th day of November, 1898, and the 1st day of January, 1901, the said defendants duly performed work, labor, and services and furnished materials to the plaintiff under the provisions of said contract, which said work, labor, and services and materials were of the reasonable value and at agreed price of two thousand seven hundred and ninety-three 64/100 ($2,793.64) dollars.

III. That thereupon the said sum became due and owing by the plaintiff to the said defendants, but no part thereof has been paid, although duly demanded, and the whole amount thereof is wholly due with interest thereon from the 31st day of December, 1900.

IV. That the aforesaid counterclaim existed in the hands of the said defendants, John O'Brien and Seth Perkins, at and was due long prior to the time of the commencement of this action.

44 For a further separate and distinct answer and defense, and by way of counterclaim, defendant alleges:

I. Defendant here repeats the allegations contained in the paragraph last numbered "I" and "IV" of defendant's first counterclaim, as if here set forth at length.

II. That said defendants, Perkins & O'Brien, duly entered upon the performance of said contract, and between the 16th day of Novem-

ber, 1898, and the 1st day of January, 1901, boarded certain inspectors of the plaintiff at the latter's request and upon the promise and agreement of said plaintiff to pay said defendants therefor.

III. That the reasonable value and agreed price of the board furnished by said defendants to said plaintiff's inspectors was the sum of ninety-seven 67/100 ($97.67) dollars.

IV. That thereupon the said sum became due and owing by the plaintiffs to the said defendants, but no part thereof has been paid, although duly demanded, and the said sum of ninety-seven 67/100 dollars is still wholly due and owing.

Wherefore said defendant John O'Brien demands judgment dismissing the complaint with costs, and that he recover judgment for the sum of twenty-five thousand four hundred and nine 09/100 ($25,409.09) dollars, and the further sum of two thousand seven hundred and ninety-three 64/100 dollars, and the further sum of ninety-seven 67/100 dollars, making in all the sum of twenty-eight thousand three hundred 40/100 ($28,300.40) dollars.

JOHN W. BROWNE,
Attorney for Defendant John O'Brien.

(O. & P. O. address, 253 Broadway, Manhattan, New York City.)

45 *City and County of New York, ss:*

JOHN W. BROWNE, being duly sworn, says: I am the attorney for the defendant, John J. O'Brien, herein. I believe the foregoing amended answer to be true. The grounds of my belief are statements made to me by the said defendant, John J. O'Brien, and statements received by me from said defendant. That the reason why this verification is not made by the said defendant is that the said defendant, John J. O'Brien, is now absent from the county and State of New York, where the deponent resides, viz. 403 West Twenty-first street, Manhattan, New York City; that said defendant is now in Waterbury, Conn.

JOHN W. BROWNE.

Sworn to before me this 20th day of March, 1906.

[L. S.] JULIA AKERS WILSON,
Notary Public, Kings Co.

(Cert. filed in N. Y. Co.)

(Endorsed:) United States Circuit Court, Southern District of New York. United States of America, plaintiff, vs. John J. O'Brien et al., defendants. Amended answer to defendant, John J. O'Brien. John W. Browne, attorney for defendant, John J. O'Brien, 253 Broadway, Manhattan, New York City. U. S. Circuit Court, Southern District, New York. Filed March 20, 1906. John A. Shields, clerk.

46 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
SETH PERKINS AND JOHN J. O'BRIEN, individually and as members of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia, defendants.

The United States of America, the plaintiffs herein, for reply to the amended answer of the defendant, John J. O'Brien, and to so much thereof as interposes a counterclaim, alleges as follows:

I. Plaintiffs, replying to the alleged "second separate and further answer and defense," admit that the United States has retained and still retains a certain reserved percentage in consideration of certain work, labor, and services performed by the said defendants, Perkins and O'Brien.

The plaintiffs deny that the same is due and owing the said defendants, Perkins and O'Brien, by reason of the fact that the damages which these plaintiffs have suffered is far in excess of the said retained percentage.

The plaintiffs deny that they have received from the defendants, Perkins and O'Brien, the entire amount or any amount due them in accordance with the terms of the said contract.

II. Replying to the alleged "third separate and further
47 answer and defense," the plaintiffs deny the allegations therein contained, and more particularly deny that by reason of the allegations therein set forth that the defendants, Perkins and O'Brien, have been damaged in the sum of twenty-five thousand four hundred and nine dollars and nine cents ($25,409.09), including retained percentages, amounting to five thousand four hundred and nine dollars and nine cents ($5,409.09), or in any other sum.

III. Replying to defendants' alleged "further, separate, and distinct answer and defense, and by way of counterclaim," the plaintiffs have no knowledge or information sufficient to form a belief as to whether the said defendants duly performed labor and services, and furnished materials to the plaintiffs of the reasonable value of twenty-seven hundred ninety-three dollars and sixty-four cents ($2,793.64) or any other sum, and therefore deny the same.

And plaintiffs deny the said sum or any other sum became due and owing by the plaintiffs to the said defendants.

Plaintiffs have no knowledge or information sufficient to form a belief as to whether the alleged counterclaim existed long prior to the time of the commencement of this action or otherwise, and therefore deny the same.

IV. Replying to the defendants' second "further, separate, and distinct answer and defense, and by way of counterclaim," plaintiffs have no knowledge or information sufficient to form a belief as to the allegations therein contained, and therefore deny the same, except that the payment of the various sums set up in the several alleged counterclaims of the defendants herein have not been paid by these plaintiffs. And the plaintiffs further deny that any sum or sums are due and owing from these plaintiffs to the defendants.

48 Wherefore the plaintiffs demand judgment dismissing each and every alleged counterclaim of the defendants, and ask judgment for the full amount asked for in the complaint, together with interest and costs of this action.

HENRY L. STIMSON,
U. S. Attorney, Attorney for Plaintiffs.

(Office and P. O. address, Room 50, P. O. Building, Borough of Manhattan, New York City.)

STATE OF NEW YORK,
Southern District of New York, ss:

ARTHUR M. KING, being duly sworn, deposes and says: That he is an assistant to the United States attorney, and attorney for the plaintiffs herein. That he has read the foregoing reply and knows the contents thereof. That the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the grounds of deponent's knowledge and source of his belief are documents on file in the War Department and Treasury Department of the United States. That the reason this verification is not made by the plaintiffs in person is that they are a corporation sovereign.

ARTHUR M. KING.

Sworn to before me this 7th day of April, 1906.

[SEAL.]

S. D. EDICK,
Notary Public, Rockland Co.

(Certificate filed in New York Co.)

49 (Endorsed:) U. S. Circuit Court, Southern District of New York. United States of America, plaintiffs, vs. Seth Perkins and John J. O'Brien, individually, &c., et al., defendants. Reply to amended answer of Defendant John J. O'Brien. Henry L. Stimson, United States attorney. Rec'd. copy of within paper this 7th day of April, 1906. John W. Browne, atty. for Deft. John J. O'Brien.

50 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN J. O'BRIEN, INDIVIDUALLY AND AS a member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Company of Philadelphia, defendants.

The issues in this action having been duly brought on for trial before the Honorable Charles M. Hough, United States district judge, holding United States Circuit Court for the Southern District of New York, and a jury at a stated term of the United States Circuit Court held on the 10th day of April, 1908, in the United States court and post-office building in the city of New York, and the said parties hereto appearing by counsel, and the issues having been duly tried, and the court having on said 10th day of April, 1908, dismissed the complaint of the plaintiffs herein upon the merits:

Now, on motion of the attorneys for the defendants,

Ordered, adjudged, and decreed that the defendants herein have judgment against the said plaintiff dismissing said complaint upon the merits.

51 Judgment signed and entered this 17th day of April, 1908.

JOHN A. SHIELDS, *Clerk.*

Consented to as to form.

HENRY L. STIMSON, *U. S. Attorney.*

F. B. Swift, attorney for deft. O'Brien and Stephen Farrelly as ancillary receiver, &c.

(Endorsed:) U. S. Circuit Court, Southern District of New York. The United States vs. John J. O'Brien, individually, and as member of firm of Perkins & O'Brien and Stephen Farrelly, as ancillary receiver, &c. Judgment with notice of entry. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, Southern District of New York. Filed Apr. 17, '08. John A. Shields, clerk.

52 United States Circuit Court, southern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
SETH PERKINS, JOHN J. O'BRIEN, INDIVIDUALLY, and as members of the firm of Perkins & O'Brien, and Stephen Farrelly as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, defendants.

Before Hon. Charles M. Hough, J., and a jury.

APRIL 10TH, 1908.

Appearances: Mr. Henry L. Stimson, United States attorney; Mr. W. T. Denison, assistant U. S. attorney, for the Government; Mr. Frederic J. Swift, for the defendants.

A jury was called, examined, accepted, and sworn.

The case was opened for the Government by Mr. Denison.

Mr. SWIFT. I wish to enter a formal demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action; and also to move to dismiss the complaint on the ground that on the face of the complaint it is shown there is no cause of action against this defendant.

53 (After argument the court overruled the demurrer and the motion.)

Mr. DENISON. I call your honor's attention to the fact that on the former trial which began on January 30, 1907, the Government's motion for leave to sever as to the defendant Perkins was granted.

I ask leave to reduce the demand of the complaint as against the defendant O'Brien to the sum of $68,169.67. This amount is made up as follows:

The difference between the defendant's contract price and the cost and reasonable value of completing the work left unfinished was $76,470.07. From this gross amount of the damage we deduct the amount of the retained percentages alleged in the third defense, being $5,409.09; and we deduct the amount of moneys retained as such percentages and otherwise under the contract for the work done in September, October, and December, 1900, being the amount mentioned in the fourth defense, or $2,793.64; and we also deduct the cost of boarding the plaintiff's inspectors, being the amount mentioned in the fifth defense, or $97.67. These deductions aggregate $8,300.40, leaving a net demand of $68,169.67.

These deductions are made, not as concessions of any counterclaim, but solely in mitigation of damages.

The COURT. The motion to reduce the demand against the defendant O'Brien is granted.

Mr. DENISON. Also I ask leave to reduce the demand against the defendant Farrelly, surety, to $27,292.45. This defendant's liability under the bond is $30,000. We credit on that liability the sum

54 of $2,707.55, the amount of the fourth and partial defense of the said surety. This deduction is made not by way of concession of any counterclaim, but solely in mitigation of damages.

The COURT. The motion for leave to reduce the demand against the surety is granted.

Mr. DENISON. I offer in evidence the bond and the contract.

(Received, marked "Exhibits 1 and 2." Exhibit No. 2, the contract, is the same as Exhibit A–A1, annexed to the complaint in this action.

Exhibit No. 1, the bond, is the same as Exhibit B, annexed to the complaint in this action.)

GEORGE W. GOETHALS, sworn for the Government, testified as follows:

Examined by Mr. DENISON:

I am a major in the United States Army. I have been in the United States Army for the last 26 and 1-2 years. I have been a major since 1900. I am a West Pointer. In August, 1900, I was holding the position of instructor of practical military engineering at West Point until August 28th, when I was relieved by orders from the War Department and directed to proceed to Newport to assume charge of the engineering work in that district. That district covered the contract on which this suit is brought. I practically succeeded Major Lockwood in that district. I say practically, because he was relieved by order sometime in July and temporarily transfered the work to his assistant, Lieutenant Johnson, of the Engineers. Up to the time of said relief, sometime in July or early
55 August, I don't know the date, Major Lockwood was the engineer in charge of the work being done by Perkins & O'Brien under the contract, Exhibit 2. When he was relieved, Lieutenant Johnson was temporarily in charge until I reported in the latter part of August. I then took charge of the work. I was the engineer officer in charge of the work. I remained in charge of that work throughout the term of the work until its completion, to the actual completion of the work. I familiarized myself with the records and papers filed in that office affecting this work prior to my taking charge. In order to familiarize myself with the district generally, and as Lieutenant Johnson was a young officer, I went to Newport in June, 1900, in order to talk over the situation of the work in various parts of the district. That was sometime the latter part of June. Major Lockwood reported the work progressing satisfactorily in all points in the district with the exception of Providence River contract and Narragansett Bay, referring to the contract here in suit. I received a report from Major Lockwood of the condition of that particular work, and thereafter, from the time I was personally in charge of this work, I kept in touch with the progress of it myself. On December 4, 1900, I wrote a letter to Perkins & O'Brien and the City Trust, Safe Deposit & Surety Company of Philadelphia. That is the letter [showing]. As far as I know it was sent.

(Letter offered in evidence, marked "Exhibit 3," and read. The following is a copy of Exhibit 3:

U. S. ENGINEER'S OFFICE,
Newport, R. I., Dec. 4, 1900.

To Messrs. PERKINS & O'BRIEN, 258 Broadway, New York,
56 N. Y., and THE CITY TRUST, SAFE DEPOSIT & SURETY COMPANY OF PHILADELPHIA, 160 Broadway, New York, N. Y.

GENTLEMEN: In connection with the contract entered into by the United States with Messrs. Perkins & O'Brien under date of November 16, 1898, for dredging in Providence River and Narragansett

Bay, R. I., I have to state that from present appearances, it does not seem to be possible for the contractors to put on other dredges than the one now supposed to be at work.

This contract calls for the removal of 2,036,491 cubic yards of material. The work was commenced in March, 1899, and up to date less than 1/4 of the work has been done. Between January 1st, 1901, and July 1, 1902, at which time the contract expires, it will be necessary to remove on an average of about 100,000 cubic yards per month. To do this work it will be necessary for the contractors to have at least three dredges on the work continuously.

Under authority of the Chief of Engineers, U. S. A., I am authorized to inform you that unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled.

Respectfully,

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.

In triplicate. One copy sent to Mr. Seth Perkins, 16 City
57 Square, Charlestown, Mass.; Mr. John J. O'Brien, 258 Broadway, New York, N. Y.; The City Trust, Safe Deposit & Surety Company of Philadelphia, 160 Broadway, New York, N. Y.)

I received this letter from Mr. O'Brien in reply to that letter on December 13, 1900.

(Certified copy of letter offered in evidence and marked "Exhibit 4," and read. The following is a copy of Exhibit 4:

[John O'Brien, contractor, No. 253 Broadway.]

NEW YORK, *Dec. 13th, 1900.*

GEO. W. GOETHALS, Esq.,
Major, Corps of Engineers, U. S. A., Newport, R. I.

DEAR SIR: Your favor of Dec. 4th is at hand. In reply I desire to say that we are about to make a deal with Mr. Kirk, which I think will be fixed up by Monday, whereby he is going to put on two more dredges, and which I think will be satisfactory to you. It may be that he cannot get ground within a few days, but it won't vary but a very short time. Mr. Seward, who I had in charge of the work, has been discharged for some time, and I didn't know but what he may have been around your office. I hope you will not give him any information in regard to my business, as he is not a reliable man, and furthermore he has left matters in very poor shape. He has run me behind this summer over $10,000.00. Will you
58 please give me an estimate for last month, and oblige,

Respectfully, yours,

JOHN O'BRIEN.)

I presume the original is on file in the Newport office; that is where it would be.

On December 29, 1900, I received a telegram from John O'Brien, of which that is a copy.

Q. I notice that is addressed to Major D. W. Lockwood, of Corps of Engineers, Newport?

A. It came to me, nevertheless.

(Offered in evidence and marked "Exhibit 5," and read. The following is a copy of Exhibit 5:

Telegram.

The Postal Cable Company transmits and delivers this message subject to the terms and conditions printed on the back of this blank.

Received at 301 Thames st., Newport, R. I., where any reply should be sent.

12 ny zg ws 8 paid 228 pm.

NEW YORK, *Dec. 29, 1900.*

Major D. W. LOCKWOOD,
Corps of Engineers, Newport.

My representative will call on you Tuesday morning.

JOHN O'BRIEN.)

I do not know the day of the week that was.

I do not know how far off Tuesday morning was.

Unless they are shown here, and there are none shown here, I had no communication from Perkins or O'Brien between the letter,
59 Exhibit 4, of December 13, 1900, and the telegram, Exhibit 5, of December 29, 1900. On December 31, 1900, I sent to Mr. O'Brien a telegram of which the annexed is a copy. The probabilities are that this (referring to Exhibit 5) must have been Saturday and received too late and that (referring to t'legram Dec. 31, 1900), was sent Monday morning on account of the discrepancy in date. At any rate, in the interim between those dates nobody had come from them.

(Telegram offered in evidence and marked "Exhibit 6," and read. The following is a copy of Exhibit 6:

Send the following message, subject to the terms on back hereof, which are hereby agreed to:

NEWPORT, R. I., *December 31, 1900.*

JOHN O'BRIEN,
253 Broadway, N. Y.

Your representative can accomplish nothing by coming here.

GOETHALS, *Engineer.*

Official business.

Chg. U. S. Engr. Office.)

On that same day I wrote a letter to Mr. O'Brien.

Letter offered in evidence marked "Exhibit 7," and read. The following is a copy of Exhibit 7:

U. S. ENGINEER'S OFFICE,
Newport, R. I.

The following is a copy of a telegram sent you this day:

60 NEWPORT, R. I., *December 31, 1900.*

JOHN O'BRIEN,
253 Broadway, N. Y.

Your representative can accomplish nothing by coming here.

GOETHALS, *Engineer.*

Official business.
Chg. U. S. Engr. Office.)

On that same day, December 31, 1900, I addressed to Perkins & O'Brien and the City Trust, Safe Deposit & Surety Company of Philadelphia a letter, of which the one shown is a copy.

(Letter offered in evidence and marked "Exhibit 8," and read. The following is a copy of Exhibit 8:

Subject:

U. S. ENGINEER'S OFFICE,
NEWPORT, R. I., *December 31st, 1900.*

To Messrs. PERKINS & O'BRIEN, 253 Broadway, New York, N. Y., and THE CITY TRUST, SAFE DEPOSIT & SURETY COMPANY OF PHILADELPHIA, PA., 160 Broadway, New York, N. Y.

GENTLEMEN: As the work under your contract for dredging in Providence River and Narragansett Bay, R. I., has not, in my judgment, been prosecuted faithfully and diligently, by authority of the Chief of Engineers, U. S. Army, and with his sanction, I have to inform you that the contract is hereby annulled.

Respectfully,

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.

61 In triplicate. One copy sent to Mr. Seth Perkins, 16 City Square, Charlestown, Mass.; Mr. John J. O'Brien, 253 Broadway, New York, N. Y.; The City Safe Deposit & Surety Company of Philadelphia, Pa., 160 Broadway, New York, N. Y.)

After that letter of December 4, 1900, Perkins & O'Brien continued work upon this contract, dredging, I think, up to the last day. I think the first of January. I don't remember what was done during the month of December; that tabulated statement will show. They excavated that month 13,405 yards.

Q. Did they during that month provide, or, so far as you know, take any steps toward providing, the equipment referred to as necessary in your letter of December 4, 1900, to accomplish 100,000 cubic yards per month?

A. Not that I know of.

There were no signs on the work, no increase in the plant on the work. There was only one dredge at work during all that period and that dredge accomplished in that month only 13,406 cubic yards net and 13,798 cubic yards gross.

The reason for that distinction is that there is a deduction. The contract provides a certain limit beyond the required depth in the channel and for all beyond that limit the dredged material is to be deducted from the gross amount. There was 392 cubic yards that month deducted because of overdepth. I think the contract provides for one foot extra in depth. In other words, the contract provides that the dredging shall not be carried outside prescribed depth. But even allowing that extra they only accomplished 13,798 cubic yards in that month.

62 On October 15, 1900, I addressed to Brigadier-General John M. Wilson, Chief of Engineers, U. S. Army, Washington, D. C., and sent to him this letter.

(Letter offered in evidence and marked "Exhibit 9" and read. The following is a copy of Exhibit 9:

Subject:

U. S. ENGINEER OFFICE,
Newport, R. I., October 15th, 1900.

Brig. Gen. JOHN M. WILSON,
Chief of Engineers, U. S. Army,
Washington, D. C.

SIR: I have the honor to recommend that the contract with Messrs. Perkins & O'Brien, for dredging about 2,036,491 cubic yards from the 25-foot channel from Providence River through the western passage of Narragansett Bay, be annulled, as the contractors are not able to satisfactorily do the work, as the following records of this office indicate:

The continuing contract with Messrs. Perkins & O'Brien, for dredging about 2,036,491 cubic yards from the 25-foot channel 400 feet wide from Providence River through the western passage of Narragansett Bay, was entered into November 16, 1898, work to commence March 1, 1899, and to be completed July 1, 1902, with usual provisions for the extension of the time of completion in the event of the failure of appropriations.

Work was commenced March 1, 1899, and the following plant was employed up to February 1, 1900:

63

March	1	dredge,	15–30	month
April	1	"	20–30	"
May	1	"	1	"
	1	"	15–30	"
June	1	"	1	"
July	1	"	1	"
August	1	"	1	"
	1	"	26–30	"

Sept	1	dredge.	1	month.
	1	"	19–30	"
Oct	1	"	1	"
	1	"	1	"
Novr	1	"	1	"
	1	"	1	"
Decr	1	"	1	"
1900	1	"	13–30	"
Jan	1	"	1	"
Total	13 & 18–30 mos.			

for 1 dredge. Amount dredged 459,887 cubic yards.

One dredge was removed from the work about the middle of December, and has not since been on the work. This dredge has been taken away from this locality, it is said to New York.

Under date of January 26, 1900, the contractors asked permission to take the other dredge off the work for a month or so on account of rough weather to be anticipated, and stated that the time could be well spent in repairs "which will enable us to start in good shape in early spring." This permission was granted. April 6th, Perkins & O'Brien's superintendent wrote to this office to say he thinks "they will be able to get to work about the middle of next week." Dredging resumed April 18th.

64 Under date of June 19, 1900, Major Lockwood wrote the contractors, referring to the remark in their letter of January 26th, in relation to repairing the dredge: "On April 16th the inspector reports that the only repairs were a new cutter for dipper and a few new tubes for the boiler.

"On April 18th the dredge resumed work and dredged during the remainder of April 11,512 cubic yards; during the month of May 13,825 cubic yards; and from June 1 to 16th, 11,068 cubic yards, a total for two months of 36,405 cubic yards.

"The following time has been lost by reason of breakdowns since the resumption of work this spring: April, 6 hrs.; May, 16 days; June 1–16, 3 days, and the dredge was removed from the work on the 16th instant with both boom sheaves broken and hoisting friction out of order. All the work this season has been in the easiest dredging on the reach below Warwick Point.

"The funds available now are sufficient to dredge upwards of 1,000,000 cubic yards, which would require dredging 100,000 cubic yards per month from now until next March, when further appropriations may be expected.

"It must be apparent to you that to carry out the spirit of your contract more dredging must be done monthly than has been done of late, and I have to say that unless I see evidence of an intention on your part to increase your monthly output I shall call the attention of the Chief of Engineers to the matter, with a view to having the work done in some way within the time specified in the contract. I

have been led to believe that an extra dredge would be put on before this, but there are no indications, so far as I know, of any such
65 action being taken on your part. The matter is becoming so serious that I must ask you to give it your immediate attention. It seems to me advisable that you should increase your monthly output to 100,000 cubic yards, in order to carry out the spirit of your contract."

The work was resumed June 25th and discontinued on the 30th, owing to a serious breakdown in main engine, requiring the towing of the machine to Providence. No work was done during July or August. The dredge was replaced on the work September 25th, but remained two days without working on account of some trouble with backing friction; on the 27th they got to work and worked the 27th and 28th, but broke a tooth in the gear wheel on the 29th and lost a day. The work was resumed October 1st and continued until the 11th instant with 2 days and 2 hours lost time. On October 11th the the two scows used with the plant were taken in tow by a tug said to be bound for New York. At present the dredge is without scows and consequently not working.

On September 13th, 1900, in letters to the contractors and sureties, after reciting the facts as given above, the contractors were informed: "Work was not started in July, and under date of August 6th, Mr. Perkins stated that work would be commenced by the 20th of August. Two weeks ago, the representative of the firm of Perkins & O'Brien called at the office and reported that the plant then at Providence was ready to go on with the work and that he had come down to make arrangements for the driving of a dolphin. He stated that the dredge would go down to the work on Tuesday or Wednes-
66 day, the 4th or 5th inst. The inspectors were notified to be on the work. Since that date nothing has been heard from the contractors. The inspector, however, reports that no further action has been taken towards driving the dolphin and that the dredge is still at Providence."

"As the dredging plant has been ready for work for the past two weeks and is still at Providence, I have to inform you that unless work is resumed immediately I shall recommend to the Chief of Engineers the annulment of the contract."

The following table shows the results of the present season's work since resuming on April 18th:

	Lost time due to breakdowns.	Cubic yards dredged.
April	6 hours.	11,512
May	16 days, 8 hrs.	13,825
June	12 days.	15,617
July	Entire month.	------
August	" "	------
September	27 days.	2,854
October *1–15*	5 days, 2 hrs.	9,447
	4 mos., 1 day, 6 hrs.	53,255

Total amount dredged under contract: 554,096 cubic yards; of this the amount dredged and not paid for: 12,301 cubic yards.

Very respectfully, your obedient servant,

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.

Through Col. G. L. Gillespie, Div. Engr. Northeast Division.

[1st indorsement.]

NORTH EAST DIVISION ENGINEER OFFICE,
New York, October 18, 1900.

67 Respectfully forwarded to the Chief Engineers, concurring in the recommendation of the district officer.

The original contract was to be executed in forty calendar months, or about twenty-five working months—or at the rate of 80,000 c. y. per working month. The progress this year has been at the rate of about 7,000 c. y. per month.

The contractors show themselves to be either unwilling or unable to do the work.

G. L. GILLESPIE,
Colonel, Corps of Engineers, Division Engineer.

160–1900.

[2nd indorsement.]

OFFICE CHIEF OF ENGINEERS,
U. S. Army, November 19, 1900.

Respectfully returned to Major Goethals. In case there is no change in this case and the contractors show no intention to proceed with the work, Major Goethals is authorized to annul the contract of Perkins & O'Brien as recommended by giving formal notice in writing of that fact to the contractors and their surety or sureties.

To be returned with copies of the letters sent as above indicated.

Brig. Gen. WILSON,
JAS. L. LUSK,
Major, Corps of Engineers.

28734
21

Through Division Engineer N. E. Division.
Recd. N. E. D. Nov. 20, 1900.

68 [3rd indorsement.]

NORTH EAST DIVISION, ENGINEER OFFICE,
New York, Nov. 20, 1900.

Respectfully returned to Major Goethals.
By direction of Colonel Gillespie, in his absence.

WM. BLAKENHORN, *Clerk.*

160–1900.

[4th Indorsement.]

U. S. ENGINEER OFFICE,
Newport, R. I., November 26, 1900.

Respectfully returned to the Chief of Engineers.

This paper was received just after receipt of a telegram from the contractors that they would have their plant, consisting of one dredge, one scow, and a tug, on the work on Thursday, the 22nd inst., so that as the conditions had changed and the contractors had showed an intention to proceed with the work, the contract could not be annulled under the second indorsement hereon. The contractors secured the release of their plant by giving bond for their indebtedness, and on the 20th inst. Mr. Perkins informed me that they were arranging with the International Dredging Company and with Mr. Packard for additional dredges to put on the work. The representative of the International Dredging Company, however, informed me that his company would put some of their plant on
69 the work if the Surety Company on the bond would guarantee payment; Mr. Packard would also assist if he could be assured of his pay. Work was resumed on Thursday, but because of the very leaky condition of the scow operations had to be suspended, and the dredge was towed to Greenwich Harbor and the scow beached at Warwick Neck. The present dredging plant is not sufficient to properly prosecute the work, and I have the honor to recommend that I may be authorized to notify the contractors that unless the plant be increased sufficiently to remove monthly the amount to complete the work under the terms of the contract, that with the approval of the Chief of Engineers the contract will be annulled on January 1, 1900. This will give them at least a month to secure additional plant and to show some determined effort to do the work in full accord with their contract.

GEO. W. GOETHALS,
Major, Corps of Engnrs.

28734

21

Through Col. G. L. Gillespie, Corps of Engineers, U. S. A., Division Engineer, Northeast Division.

Recd. N. E. D. Nov. 27, 1900.

70 [5th Indorsement.]

NORTHEAST DIVISION ENGINEER OFFICE,
New York, Nov. 27, 1900.

Respectfully returned to the Chief of Engineers.

By direction of Colonel Gillespie, in his absence.

WM. BLAKENHORN, *Clerk.*

160–1900.

[6th indorsement.]

OFFICE CHIEF OF ENGINEERS,
U. S. Army, Dec. 3, 1900.

Respectfully returned to Major Goethals, who is authorized to proceed as recommended in the 4th indorsement hereon.

To be returned.

By command of Brig. Gen. Wilson.

JAS. L. LUSK,
Major, Corps of Engineers.

28734
21

71 [7th indorsement.]

U. S. ENGINEER OFFICE,
Newport, R. I., January 2, 1901.

Respectfully returned to the Chief of Engineers, U. S. Army, and attention invited to accompanying report and inclosures.

GEO. W. GOETHALS,
Major, Corps of Engrs.

28734
21

Thro' Col. G. L. Gillespie, Corps of Engineers, U. S. A., Div. Engr. N. E. Div.

Recd. N. E. D. Jany. 3, 1901.

1 enclo.

[8th indorsement.]

NORTH EAST DIVISION ENGINEER OFFICE.
New York, Jan. 3, 1901.

Respectfully returned to the Chief of Engineers, concurring in the action of the district officer in annulling the contract.

G. L. GILLESPIE,
Colonel, Corps of Engineers, Division Engineers.

160–1900.

Inclos. 1–3 accompg.

Recd. Office Chief of Engrs, Jan. 4, 1901.

Those papers described as indorsements on that letter were
72 actual indorsements thereon as they purport to be. These are copies of the records of the office at Newport, and my impression is that you have the original of that letter here with all the indorsements. I have sent it here.

Mr. DENISON. I offer in evidence the indorsements upon the letter as a part of the same exhibit.

(Received in evidence including 8 indorsements.)

General Wilson at that time was the Chief of Engineers.

This statement in the letter means that there was work done only from the first to the 16th of June, and out of that time three days were lost.

So far as I know my final letter of December 31st, 1901, was mailed as indicated by the address.

One was mailed to the Surety Company in Philadelphia, and one to Perkins & O'Brien at New York. I think one was mailed to O'Brien; the records show; and one to Mr. Perkins.

Q. (By Mr. SWIFT.) Did you say one was mailed to the Surety Company in Philadelphia?

A. Yes.

Q. You know that?

A. I know that I sent the letter to them.

Q. Was that sent to Philadelphia?

A. I do not know. The addresses are given here, I believe, in those written copies.

Q. The address is New York?

A. Then it was at New York.

Q. (By Mr. DENISON.) Exhibit Eight is the letter referred to?

A. Yes, sir.

73 Q. That is addressed to Perkins & O'Brien, 253 Broadway, New York, and the defendant Trust Company, of Philadelphia, Pa., 160 Broadway, New York?

A. Yes; the records of the office show that copies of that letter were sent to those various addresses.

Q. But they were posted in Newport on that date?

A. On December 31st.

Q. (By Mr. SWIFT.) How do you know they were?

A. I presume the office did its work. I do not take them out myself to the mail.

Mr. DENISON. The receipt is admitted.

Q. (By Mr. DENISON.) It could not have been received in the original course of mail prior to January 1st?

A. Not before January 1st.

Q. Now, in making this annulment of the contract were you actuated by any fraudulent motive?

Mr. SWIFT. I object to the form of the question—first, as calling for a conclusion, and, second, there is no defense of fraud here.

The COURT. On Mr. Swift's admission the objection is sustained. Fraud is not presumed, and I do not see any claim of fraud in the answer.

Mr. SWIFT. I have not alleged fraud to my knowledge.

I have been personally acquainted with Perkins and O'Brien excepting in connection with this work. Mr. Perkins came to the office two or three times during the progress of the work, and it was in connection with the work.

Mr. O'Brien, I believe, came once, and we had some talk about the time remaining under the contract within which it could

74 be completed. My talk with both of them was very amicable.

Q. Will you state to the jury and the court the facts which led you to this act of annulling this contract?

A. The work was not being prosecuted as it should have been. The contract contemplated approximately 2,000,000 yards of work to be done within 40 months. It required the removal of about 2,000,000 cubic yards in 40 months. This would necessitate on an average about 50,000 cubic yards per month. The contractors in about half the time had only removed about one-quarter of the amount required under the contract. They had been cautioned by Major Lockwood in June that the work was not satisfactory, and they were requested to increase their plant. This, after promises, they failed to do. They lost the best part of the summer, the dredge remaining idle. The contractors apparently endeavored to get outside help from the International Contracting Co., and Mr. Packard, both parties owning dredges, because I had interviews with these people, and these people said that they would furnish Perkins & O'Brien with dredges provided some assurance could be made of their getting paid for the work done by their dredges. Their dredge while undergoing repairs at Providence had been attached for debt——

Q. (By Mr. DENISON.) When was that?

A. Sometime while I was in charge. There was a letter of November 13th. I had sent the letter October 15th to the Chief of Engineers, recommending the annulment of the contract. The letter was being delayed in Washington, but on November 13th I wrote him another letter, calling attention to the fact that the dredge and tug belonging to the contractors were in the hands of the United States marshal of the district, and were to be sold on the 17th unless satisfactory arrangements were made for the release or the debt was
75 liquidated. Sometime during the early fall of 1900 two scows were procured by the contractors, apparently from New York, and those were taken from the work by New York parties; the tug came alongside and took off the scows and left the dredge without scows and the work was delayed. These various matters led me to the conclusion that either they were not financially able to continue the work satisfactorily, or, if they had the means, they did not care to use it in that way. The work was being done in a stretch of the river and in a stretch of the bay where there was considerable commerce. There was a great many complaints made by commercial interests that the dolphins were not kept lighted, and they were an obstruction to navigation, and both the scows and dredge were obstructions, especially during foggy seasons. Dolphins are clumps of piles driven to form a line to guide the dredge in its work. I came to the conclusion it was better to have the contract annulled and get the work done in some other way than to allow it to drift along for 18 months and then have to resort to another contract. Consequently I wrote my letter of October 15th to the Chief of Engineers recommending annulment, and I was finally authorized to annul the contract on January 1st, 1901, unless in the meantime the contractors showed their ability to do the work by putting on the work sufficient plant to accomplish it.

Q. (By Mr. SWIFT.) When you say you were authorized, you mean by the letter with the endorsements?

A. Exactly; the Chief of Engineers authorized me to annul it.

Q. By the endorsements on your letter?

A. On the October 15th letter.

Q. (By Mr. SWIFT.) Is there an endorsement on that letter by the Chief of Engineers?

76 A. He has not signed any endorsement. It is by his subordinate.

Q. (By the COURT.) What position did Major Lusk occupy in the Chief of Engineers' office at the time?

A. He was an assistant to the Chief of Engineers, and his action was in the name of the Chief of Engineers and by his authority.

Q. (By Mr. DENISON.) What was the total amount dredged by Perkins & O'Brien?

A. I have that data in a memorandum [after referring]. They dredged 526,708 cubic yards.

Q. (By Mr. SWIFT.) Was that net?

A. Yes; that was net.

Q. (By Mr. DENISON.) How many months did that take?

A. That was 22 months.

Q. And that gives an average per month of how much?

A. 23,941 yards.

The successor contractors in completing the contract dredged 1,365,527 cubic yards net. It took them 18 months for that. Perkins and O'Brien for the 13 months from December 1st, 1899, to January 1st, 1901, accomplished 120,584 cubic yards net.

This paper is a Coast Survey chart showing the coast from Cuttyhunk to Block Island, including Narragansett Bay, and on it in blue of the water section is indicated the area that was to be dredged under the contract with Perkins & O'Brien and subsequently with the International Contracting Company. They are the areas which were actually dredged by the two together.

(Offered in evidence and marked Exhibit 10.)

After the annulment of this contract I readvertised the work, drawing specifications to agree with the specifications of the Perkins & O'Brien contract, opened the bids after 30 days' advertise-

77 ment and awarded the contract—recommended the award of the contract to the International Contracting Company, the lowest bidders. Their bid was at the rate of 16 and 4/10; it is in writing.

Mr. DENISON. I offer in evidence the contract with the International Dredging Company, marked "Exhibit 11."

Advertisement.

U. S. ENGINEER OFFICE,
Newport, R. I., January 28, 1901.

Sealed proposals for dredging Providence River and Narragansett Bay, R. I., will be received here until February 28, 1901, and then publicly opened. Information furnished on application.

GEO. W. GOETHALS,
Major of Engineers.

Specifications.

General instructions for bidders.

1. The attention of bidders is especially invited to the acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place and to make their own estimates of the facilities and difficulties attend-
78 ing the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office. One copy of the guaranty, if given with an individual or individuals, as surety, must have an internal revenue stamp, or stamps, of the value of fifty cents affixed; if given with a guaranty company as surety it must have, in addition to a fifty cent stamp, a stamp or stamps denoting one-half of one cent on each dollar, or fractional part thereof, paid by the principal obligor as a premium, and the amount of said premium must be certified to by the guaranty company.

6. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of a United States court, United States district attorney, United States commissioner, or judge or clerk of a state court of record, with the seal of said court attached.

7. A firm as such will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stockholders who are

not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

8. When the principal, a guarantor, or surety is an individual, his signature to a guaranty or bond shall have affixed to it an adhesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties,
79 contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

9. Each guarantor will justify in the sum of ten thousand (10,000) dollars. The liability of the guarantors and bidders is determined by the act of March 3, 1883, 22 Statutes, 487, chap. 120, and is expressed in the guaranty attached to the bid.

10. A proposal by a person who affixes to his signature the word "president," "secretary," "agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, and other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof, or by its agent, giving the names of all members of the firm. Any one signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

11. The place of residence of every bidder, and post office address, with county and State, must be given after his signature.

12. All prices must be written as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal and be considered as comprising a part of it.

80 14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid or to whom information in respect to proposals may have been given.

16. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal, and cause their rejection.

17. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

18. If a bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself,

by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

19. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

20. No bids received after the time set for opening of proposals will be considered.

21. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for dredging in Providence River and Narragansett Bay, R. I., to be opened February 28, 1901," and enclosed in another sealed envelope addressed to Major Geo. W. Goethals, Corps of Engineers, but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

81 22. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received, also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

23. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security in an amount of twenty-five thousand (25,000) dollars within ten (10) days after being notified of the acceptance of his proposal. One copy of the bond accompanying the contract must have internal revenue stamps affixed in the same way, to the same value, and with a certificate of premium charged as explained in paragraph 5 above.

24. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

25. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

26. Bidders are invited to be present at the opening of the bids.

General conditions.

27. A copy of this advertisement, specifications, and instructions will be attached to the contract and form a part of it.

82 28. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

29. Transfer of contracts, or of interests in contracts, are prohibited by law.

30. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

31. The decision of the engineer officer in charge as to quality and quantity shall be final.

32. It is understood and agreed that the quantities given are approximate, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than ten per cent from the estimates.

33. Payments will be made monthly, when funds are available, ten (10) per cent being reserved until the total amount thus retained is equal to ten (10) per cent of the cost of completing the remainder of the contract as estimated by the engineer officer in charge. When this amount has been retained, no further reservation shall be made from the monthly payments; and at the last monthly payment of each fiscal year (except for the year ending June 30, 1901) such portion of the total amount retained as will then reduce it to ten (10) per cent of the cost of completing the then remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor. Should payments be discontinued for a period of
83 one year owing to lack of funds, the total amount reserved from previous payments shall be paid to the contractor, it being understood that such payments will in no respect release the contractor from his obligations under this contract, but that the contract and accompanying bond are to remain in full force and virtue the same as if such reserved per centum had not been paid.

34. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor: Provided, however, That if the party of the first part shall, in the exercise of his discretion, because of local or state quarantine restrictions, freshets, ice, or other force or violence of the elements, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract adopted and in use by the Engineer Department of the Army.

35. The contractor will be required to hold the United States harmless against all claims for the use of any patented article, process, or appliance in connection with the contract herein contemplated.

36. The work to be performed under the contract to be entered into and the conditions of the contract must be in accordance with

the river and harbor act of June 3, 1896, which provides as follows:

"Improving Providence River and Narragansett Bay, Rhode
84 Island: Continuing improvement, according to the report of the Chief of Engineers dated April ninth, eighteen hundred and ninety-six. * * * Provided, That contracts may be entered into by the Secretary of War for such materials and work as may be necessary for the completion of such projects, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate $707,000, exclusive of the amount herein and hertofore appropriated.

"SECTION 5. That under authority to make contracts for material and work under the provisions of this act in addition to the sum appropriated herein, the Secretary of War shall not obligate the Government to pay in any one fiscal year, beginning July first, eighteen hundred and ninety-seven, more than four hundred thousand dollars upon the said contracts for any one of the works herein placed under the contract system, except as herein otherwise specifically authorized to do;

"Provided, any part of the annual allotment herein provided for, not earned and paid for material furnished or work done in one fiscal year, may be paid for material furnished and work done under the contracts in any subsequent fiscal year: Provided further, That nothing herein contained shall be so construed as to prevent the Secretary of War from making contracts for the whole or any part of the works placed under the contract system in such manner as may be deemed best, payments, however, to be made as stated in this section."

Under the foregoing and subsequent acts of Congress there have been appropriated sums aggregating $339,489.00.

37. The amount at present available for this work is $124,000, from which must be provided funds for the superintendence and
85 contingencies of the work. The total amount of work under these specifications and for which bids are now invited is estimated at 1,510,000 cubic yards.

38. The work to be done is completing the dredging in Narragansett Bay from a point about 4,500 feet below the Conimicut Point to deep water north of Prudence Island, and from Warwick Neck south to near Quonset Point, R. I. The depth of cutting varies from 0 to 9 feet. The character of the material to be removed is as follows: In the reach north of Prudence Island, 4 to 5 feet of mud over 1 to 2 feet of compact sand. In the reach below Warwick Neck, from 0 to 8 feet of sand, very fine and compact at north end, becoming coarser toward the south end.

The foregoing description of material and depth of cut is believed to be fair, but bidders are expected to satisfy themselves concerning these points, and no allowance will be made for variations from the above, discovered during the progress of the work.

39. The finished channel is to be 400 feet wide on the bottom and 25 feet deep at mean low water. No allowance will be made for overdepth exceeding one foot, and deductions for overdepths determined from inspector's notes will be made each month.

40. The mean rise and fall of the tide is about 4.7 feet.

41. Excavation material will be dumped in not less than 12 fathoms of water east of Prudence Island, Narragansett Bay, or south of Beaver Tail Light, as the engineer officer in charge may direct.

42. Actual work of dredging must be commenced by the contractor on or before April 1st, 1901, and be completed by October 1,
86 1903. Should operations be suspended awaiting appropriations the time allowed for completion of contract may be correspondingly extended and the operations of paragraph 35 of these specifications will be suspended for a similar period.

43. When available funds are exhausted the contractor will be notified, and he shall then have the option to continue the work as rapidly as possible under the law and contract, relying upon future appropriations for payment, or suspend operations until such appropriations are actually made and available.

44. In case of cessation or suspension of work while awaiting appropriations by Congress, the contractor shall resume work within 30 days after notification that funds are made available for payment for work under the contract.

45. The amount of work done will be measured by the cubic yards in scows. The inspector will measure each scow and determine its capacity when even full; his judgment as to whether any scow load is full or to what extent it is short shall be accepted as final. In estimating the dredging done below grade, if any, the quality measured in place will be increased by 25 per cent and deducted from the scow measurement.

46. At the beginning of the work, the contractor shall have the number of each scow conspicuously painted on it.

47. No dredging will be done between the hours of sunset and sunrise nor upon legal holidays or Sundays.

48. The location of the work will be marked in advance by the inspector, and tide gauges set to guide dredging to depth. The contractor will be responsible for their maintenance under the inspector's supervision.

87 49. The contractor must, at his own expense, furnish the inspector with a suitable boat, and assistance in taking soundings or for other work in connection with his duties. He must also, when he supplies his working force with board and lodging, supply same at reasonable price for the inspector or inspectors, if required, to be paid for by the United States.

50. Any employee of the contractor who shall be guilty of improper acts or unfair work and whose discharge is demanded on such grounds by the engineer officer in charge shall be at once discharged from the work by the contractor and shall not again be employed upon it.

51. Care shall be taken by the contractor that regular navigation is interfered with as little as possible. The United States will not be responsible for any accident that may occur to the contractor's employees, plant, or passing vessels, or to any other property whatever during the progress of the work and by reason of it.

Proposal for dredging.

1901.

To Major GEORGE W. GOETHALS,
Corps of Engineers, U. S. A., Newport, R. I.

SIR: In accordance with your advertisement of January 28, 1901, inviting proposals for dredging Providence River and Narragansett Bay, R. I., and subject to all the conditions and requirements thereof, and of your specifications of same date, copies of both of which are hereto attached, and so far as they relate to the proposal, are made a part of it, we (or) I propose to furnish the necessary plant and
88 do all the dredging required at cents per cubic yard measurement.

We (or) I make this proposal with a full knowledge of the kind, quantity of the articles required, and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof.

(Signature) THE INTERNATIONAL CONTRACTING COMPANY,
(Address) W. K. NIVER, *President.*
(Signature)
(Address)
(Signed in triplicate.)

The following is a copy of Exhibit 11:

(To be used when the specifications do not call for liquidated damages.)

1. This agreement entered into this thirteenth day of March, nineteen hundred and one, between Major George W. Goethals, Corps of Engineers, United States Army, of the first part, and The International Contracting Company, of Syracuse, in the county of Onondaga, State of New York, of the second part, witnesseth, that, in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major Geo. W. Goethals for and in behalf of the United States of America, and the said The International Contracting Company, do covenant and agree, to and with each other, as follows:

That the said The International Contracting Company, party of the second part, is to furnish the necessary equipment and do all the work of dredging required in improving Providence River
89 and Narragansett Bay, R. I., from a point about 4,500 feet below Conimicut Point to deep water north of Prudence Island and from Warwick Neck south to near Quonset Point, R. I., in accordance with the requirements of the specifications hereunto attached.

In consideration of the party of the second part performing the required work (removing about 1,510,000 cubic yards of material), the party of the first part agrees to pay the party of the second part at the rate of sixteen and four-tenths (16.4) cents per cubic yard, scow measure.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government; and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said The International Contracting Company shall commence the work herein contracted for on or before April 1, 1901, and shall complete the same on or before October 1, 1903.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties or either of them) of the second part, and upon the giving of such notice all pay-
90 ments to the party or parties of the second part under this contract shall cease, and all money reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, That if the party (or parties) of the second part shall, by epidemics, freshets, ice, local or state quarantine restrictions, force or violence of the elements, or other unavoidable cause of delay, and by no fault of his or their own, be prevented either from commencing or completing the work,

or delivering the materials at the time agreed upon in this contract, such additional time may, with the prior sanction of the Chief of Engineers, be allowed him or them, in writing, for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allow-
91 ance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

5. It is further expressly understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, the said United States shall have the right to recover from the party of the second part all cost of inspection and superintendence incurred by the said United States during the period of delay, and also whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same. And the said party of the first part may deduct or retain all the above-mentioned sums out of or from any money or reserved percentage that may be due or become due the party of the second part under this agreement.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quality, whether of labor or material, as would either increase or diminish the cost of the work then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved
92 before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agrees to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

11. Payments shall be made to the said The International Contracting Company monthly, based upon amount of material removed, in the manner specially provided for in the specifications.

93 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said The International Contracting Company are reserved to the United States.

13. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom. But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

JOHN T. NESDALL, as to
THE INTERNATIONAL CONTRACTING COMPANY,
By W. K. NIVER, *President.*
ASA B. KENNAN, as to
GEO. W. GOETHALS,
as to *Major Corps of Engineers.*

(Executed in quintuplicate.)

Approved Mar. 27, 1901.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers, U. S. Army.

94 I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ; that I made the same fairly, without any benefit or advantage to myself or allowing any such benefit or advantage corruptly to the said or any other person; and that

the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

Corps of Engineers.

Subscribed and sworn to before me this day of 190 .

NOTE.—Here add to any contract made with an incorporated company for its general benefit the following words, viz: "But this stipulation, so far as it relates to Members of or Delegates to Congress, is not to be construed to extend to this contract." (See sec. 3740, Revised Statutes.)

NOTE.—This affidavit is required only on the quintuplicate copy of contract intended for the Returns Office, Department of the Interior. (A. R. 556.)

NOTE.—The copy of contract for the Bureau must be accompanied with an abstract of the bids, and copy of each bid and advertisement, unless previously furnished. (A. R. 548.)

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; and an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

95 I consider 16 and 4/10 cents a cubic yard a reasonable price for the work let and so reported to the Engineer Department. In order to complete the work 1,365,537 cubic yards was done at that price. The International Contracting Company were paid for their work at the rate of 16 and 4/10 cents a yard.

Q. Will you state whether the 16 4/10 cents per cubic yard was a reasonable price to be paid for the work of dredging at the point in question under obligations precisely identical with those which were imposed upon Perkins & O'Brien by their contract?

A. I so regarded it and recommended the acceptance of the bid based on the fact that it was reasonable under exactly the same obligations.

Q. Will you state whether or not the work which remained to be done after Perkins & O'Brien left, contained a different percentage of hard work than the percentage which existed at the beginning of the contract of Perkins & O'Brien?

A. In the upper reach Perkins & O'Brien practically did all the soft digging that was to be done. They began the dredging at the upper part of the cut, when they struck hard material. After dredging the soft material in the upper part of the first reach and striking the harder material, they requested permission to remove the dredges to the lower portion of the upper reach until they could

make arrangements for a dredge that could better handle the hard material in the upper reach. Permission was granted to do this, so that the only portion left in the upper reach to be completed was hard material. The material in the lower reach was mixed hard and soft, probably more hard than soft. The greater part of the dredging Perkins & O'Brien completed consisted of work done in the upper reach, so that the new contractors had to complete the hard work in the upper reach and then, under the terms of the contract, a
96 survey is made on the completion of the work and any lumps that are remaining above the 25-foot depth the contractor is obliged to remove. There are always such ridges left after a dredge goes over a particular area, so that the new contractors would have to clean off those lumps that were left.

Mr. DENISON. I offer in evidence a letter of September 13th, marked "Exhibit 12."

The following is a copy of Exhibit 12:

Subject:

U. S. ENGINEER OFFICE,
Newport, R. I., September 13, 1900.

To Messrs. PERKINS & O'BRIEN, 258 Broadway, New York, N. Y., and THE CITY TRUST, SAFE DEPOSIT & SURETY COMPANY OF PHILADELPHIA, PA., 160 Broadway, New York, N. Y.

GENTLEMEN: Under the contract entered into with the United States by Messrs. Perkins & O'Brien, under date of November 16, 1898, for dredging in Providence River and Narragansett Bay, R. I., the said Perkins & O'Brien agreed to commence work on or before the first day of March, 1899, and to complete the work on or before the first day of July, 1902. The contract further stipulated that should the said contractors fail to prosecute faithfully and diligently the work in accordance with the specifications and the requirements of the contract, then the party of the first part, or his successor legally appointed, should have power, with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to that effect to the parties of the second part.

97 In connection with the above, I would state that, in my opinion, the work has not been faithfully prosecuted. The following is a statement of the work done during the present calendar year:

1900.			
January		Worked all the month excepting four days (12, 29, 30, 31)	23,224 cu. yds.
		Work suspended until April 18.	
April	18 to 30	Worked each day	11,512 " "
May	1 to 15	Worked each day except 5th	13,825 " "
	16 to 31	Laid up for repairs. No work.	
June	1 to 15	Worked each day except 5th	15,617 " "
	16 to 23	Repairing.	
	25 to 30	Worked each day.	
		No work since June 30.	

As will be seen, no work has been done since June 30, 1900, although on July 2, 1900, one of the contractors, Mr. Perkins, visited

this office and in conversation with Major Lockwood stated that the work would be resumed at an early date and further that he was making arrangements for an additional dredge. Under date of July 13 it was further stated that they would hasten the repairs on the dredge then at Providence, and that arrangements had been made for a clam shell machine to go on the upper reach. Work was not started in July and under date of August 6, Mr. Perkins stated that work would be commenced by the 20th of August. Two weeks ago the representative of the firm of Perkins & O'Brien called at the office and reported that the plant then at Providence was ready to go on with the work and that he had come down to make arrangements for the driving of a dolphin. He stated that the dredge would go down to the work on Tuesday or Wednesday, the 4th or 5th inst. The inspectors were notified to be on the work. Since that date,
98 nothing has been heard from the contractors. The inspection, however, reports that no further action has been taken towards driving the dolphin and that the dredge is still at Providence.

As the dredging plant has been ready for work for the past two weeks and is still at Providence, I have to inform you that unless work is resumed immediately I shall recommend to the Chief of Engineers the annulment of the contract.

Respectfully,

GEO. M. GOETHALS,
Major, Corps of Engineers, U. S. A.

In triplicate. One copy sent to Mr. Seth Perkins, 16 City Square, Charlestown, Mass.; Mr. John J. O'Brien, 258 Broadway, New York, N. Y.; The City Trust, Safe Deposit & Surety Company of Philadelphia, Pa., 160 Broadway, New York, N. Y.)

Cross-examination by Mr. SWIFT:

I went to Newport shortly after August 28th, between August 28th and 31st. I was the engineer in charge of all the work within that specific district, and in that district was this dredging contract. After I went to Newport I made a payment to Perkins & O'Brien for work done upon this contract. Whenever payments were made I made payments, but I don't remember that I made them a payment because—I did not make any payments to Perkins & O'Brien after I went on this work; because they did no work in August so there was no work paid for and there was no payment to Perkins & O'Brien that I remember from August on.

99 Payments were to be made monthly on this contract and it is the custom of the office to make estimates monthly for the work done during the previous months. The local officer if he has funds to his credit is authorized to pay them as soon as the estimates are prepared and the necessary vouchers signed. So that the officer in charge at Newport would have made the payments himself. While Major Lockwood was there he made the payments. It was the custom at the beginning of each month to make an estimate for the

work done during the previous month and then make payment. The estimates were usually prepared in the office shortly after the close of the month. The vouchers covering the amount to be paid were made out, forwarded to the contractors for signature, and after return by them if the necessary funds were to the credit of the officer in the proper depository, he drew a check for the amount. I am not prepared to state that funds were always in this contract in the depository sufficient to pay. Each month we would make a request on the Treasury Department for certain funds to pay for prospective work. There were often delays in filling our requisitions. We have to wait as long as three months.

I have no such reason as that for holding any payment due here. As far as I was concerned the funds were available.

These vouchers or receipts were sent to the contractors without any request on their part. My impression is that after I went there in August, Perkins & O'Brien made a request, some time subsequent to the recommendation for the annulment of the contract, October 15th. Not prior to that as I remember. My recollection is that they made it subsequent to that. If my recollection serves me correctly, the request was made by Mr. O'Brien in person and I told him I could not pay it.

I am acquainted with this contract.

100 I have a list in my pocket of the payments actually made to Perkins & O'Brien. The first payment was on April 27, 1899. That was for the work done in the previous month, March. The second payment was the 26th of the next month and the date of the next payment was the 26th of the following, that would be June. The date of the next payment was July 11th. The date of the next payment was August 24th. All of those were in 1899.

Payments were made right straight along monthly for any work that had been done during the previous month. The last payment was the 17th of July, 1900, and was for work done in June, 1900.

I know what work was done by these contractors each month. There was due for work done in September, 1900, $308.23. The amount of this work was 2,854 yards net. In October they did 9,607 yards, and in December of that year, 13,406 yards.

Q. What was the total amount due to Perkins & O'Brien for work done by them during September, October, and December, 1900?

Mr. STIMSON. Objected to in form in the use of the word due.

Mr. SWIFT. I am taking the witness' own words.

The COURT. You can change the form of the question. What was the contract price for removing the amount removed during that time?

Mr. SWIFT. I chose the word due because the witness in answer had said there was due in September so much money.

The COURT. Go ahead.

During July and August they did nothing; no payments due. During September they did work amounting under the con-

101 tract to $308.23. During October they did work amounting

to $1,037.56. In November they did not work. In December they did work amounting to $1,447.85. Making a total of $2,793.64. In addition to that amount there was also the sum of $97.67 for board of the inspectors, the contract providing that they should be reimbursed for board. None of these amounts for those different months were ever tendered to Perkins & O'Brien and no estimate was made by me for the purpose of payment.

Q. In other words, you started on the 1st day of September, 1900, to retain the moneys for work done under this contract?

A. No; that is hardly a fair statement, because they had done no work in August.

Q. Well, on the 1st of October, then?

A. No; because the vouchers had not been made up. The vouchers had probably been made up about the 10th of the month.

Q. Say the 10th of October, then; you started on the 10th of October, 1900, to retain the money that had been earned by Perkins & O'Brien for that work?

A. In September——

Mr. DENISON. I make the same objection on that as to the word earned. We claim it had not been earned.

The COURT. It is understood that it had been earned in the sense that a man may earn money when he is working.

I made up a statement, on which this suit is based, as I am required to do, of the amount the Government had to pay; the amount that was paid Perkins & O'Brien; the difference; the amount still due Perkins & O'Brien under their original contract; and forwarded that to Washington. That is all my transaction covered. The amount due Perkins & O'Brien under their original contract
102 was $2,891.31 and the $5,400 retained percentage. That was still on our books as a balance. After submitting those figures to the Chief Engineers I had nothing further to do with the matter. I never saw General Wilson in regard to this. The whole matter was conducted by correspondence.

Q. You have no knowledge, then, as I understand it, that General Wilson personally authorized the annulment of this contract?

A. Why to me——

Q. Never mind what to you. Answer the question.

A. Personally, I have no knowledge of what occurred in his office when the paper reached there.

Q. And you have no written authority of any sort, kind, or nature, have you, of the sanction of General Wilson as Chief of Engineers annulling this contract signed by himself?

A. The authority is that endorsement on my letter of the 15th as signed——

Q. As signed by himself?

A. As signed by himself; no.

I personally undertook the readvertisement for this new contract. Let me say in connection with that, however, that everything had to be in accordance with orders from Washington. I had no right

of my own volition. I undertook the details of it. I did not choose the form of contract. That is prescribed by Washington. The contract Perkins & O'Brien signed was a contract drawn by the Government. There were no changes made in it by Perkins & O'Brien's suggestion. It was the regular form of contract, and the contract signed by this International Dredging Company was also a contract drawn by the Government. I believe there was a change in form authorized or required by the War Department between the dates of those two contracts. There was one form prescribed in 1899, which form was used in the Perkins & O'Brien contract, and subsequent
103 to that there was a form adopted by the War Department and enjoined upon us which makes some change in the form. I imagine the form which was made with the International Dredging Company was this new form, because there is a change in the form between those dates. I did not notice it at the time, but I saw it a few days ago in Washington, the matter coming up in connection with some other matters in The Adjutant-General's office, and I was looking up the forms, so I imagine the Perkins & O'Brien contract was under the old form of 1899 and that the International Dredging Company was under the latter form, but of that I am not certain.

Q. There has been placed in evidence here a telegram from you to O'Brien refusing to see his representative if he came to Newport.

A. That is putting it a little strong, isn't it?

Q. The telegram I refer to reads, "Your representative can accomplish nothing by coming here." At the time that you sent that telegram did you know what the representative wanted?

A. No; but the telegram is dated on the 31st of December and no dredges or no increased plant had been sent to the works.

I did not know what the representative wanted. I do not think we sent any sort of notice to the Surety Company of the reletting of the contract or readvertisement, after this contract was annulled—of that I am certain. To my knowledge we did not. I had charge of the details. I cannot recall any action on our part at any time calling upon the Surety Company after this annulment or at the time of this annulment to complete this contract.

We annulled the contract on December 31, 1900, and after that, as far I remember, had no communication of any sort with this Surety Company. I should like to state, however, that of all action taken the Surety Company was fully advised. I sent no notice to
104 the Surety Company of the reletting or of the advertisement or of the new contract. I had no communication of any sort with the Surety Company after the date of the annulment. The letters referred to as having been sent to them were the letters prior to the date of the annulment relating to the condition of the work under Perkins & O'Brien so as to keep them advised as to how the work was progressing.

Practically 18 months were left of the time within which this contract could have been completed. The new contractors practically took this time to complete the contract. It may have been exactly

18 months. During seven out of these 18 months the new contractor did 100,000 yards or over. The new contractor had five dredges all told upon the work. They were not all there all the time. They had practically three all the time and five some of the time, two constantly; then the other two from May until October in addition, and then in March, 1902, they put on that other dredge and that continued until the end; three to the end. They had four dredges on at the beginning, worked up to and including October, and then they took off two. That left two dredges on through to the 1st of March and then they put on another dredge and continued that. The amount of material dredged each month was practically dependent up the number of dredges used and the order in which the dredges were kept by constant breakdowns, but if the dredges were kept in good repair they could do more. The amount of dredging required to complete this contract was considerably less than I anticipated at the time. It turned out that instead of having a million and a half and more yards to dredge there was only 1,300,000. And from my experience from dredging it was a very possible thing, easily accomplished, for any one to have completed that contract within the 18 months if they had the plant. That is a very essential element.
105 So that when I annulled the contract it was not annulled because*d* of lack of time within which to complete it. There was fully sufficient time left for these men to complete the contract if they could get the plant. My judgment was that these men could not control sufficient plant to complete what remained to be done under the contract in the remaining time.

I am acquainted with the signature of Elihu Root, the former Secretary of War at the time of this contract. I should say these letters of January 11, 1901, and January 30, 1901 [showing], were signed by Mr. Root.

Mr. STIMSON. That is his signature, subject to whatever objection there may be to the letter.

(Letters offered in evidence and marked "Exhibits A and B.")

Mr. SWIFT. I offer letter of January 11, 1901, from Mr. Root, Secretary of War, to John J. O'Brien, together with the enclosure which is a report of January 2, 1901, from George W. Goethals to Brigadier-General John M. Wilson, Chief of Engineers; also letter of January 31, 1901, from the Secretary of War to the same.

The following is a copy of Exhibit A:

EXHIBIT A.

WAR DEPARTMENT,
Washington, January 11, 1901.

(File No. 4510—6'00.)

DEAR SIR: I have the honor to acknowledge the receipt of your letter of 5th inst., in which you call attention to a recent interview had with my secretary, and, in accordance with his sugges-
106 tions, submit certain facts concerning the annulment of con-

tract of Messrs. Perkins and O'Brien for dredging at Providence, Rhode Island.

Replying thereto I have to inform you that it appears from a report of the Engineer Department that, on December 31st ultimo, the local officer in charge, Major George W. Goethals, stationed at Newport, Rhode Island, with the sanction of the Chief of Engineers, U. S. Army, formally annulled the contract in question for failure of the contractors to faithfully and diligently prosecute the work as required by the terms of the agreement.

Attention is invited to the accompanying copy of report of Major Goethals on the subject, dated January 2nd instant.

Very respectfully,

ELIHU ROOT, *Secretary of War.*

Mr. JOHN J. O'BRIEN,
Contractor, 253 Broadway, New York, N. Y.

(Inclosure: Copy of report referred to.)
Subject: Contract of Perkins & O'Brien. Providence River, R. I.

U. S. ENGINEER OFFICE,
NEWPORT, R. I., *January 2, 1901.*

Brig. Gen. JOHN M. WILSON,
Chief of Engineers, U. S. Army, Washington, D. C.

GENERAL: On receipt of the paper (E. D. F. M. No. 2873421), the 7th indorsement on which this accompanies, the contractors were notified that unless they had sufficient plant on the work by January 1, 1901, to dredge at least 100,000 cubic yards per month, the
107 contract would be annulled. This letter was written on December 4th, copy herewith, and addressed to the contractors and a copy sent to the surety company on the bond.

Under date of the 13th ult., one John O'Brien wrote that "we are about to make a deal with Mr. Kirk, which I think will be fixed up for Monday, whereby he is going to put in two more dredges, and which I think will be satisfactory to you. It may be that he can not get around within a few days, but it won't vary but a very short time." Nothing has since been heard of these dredgers nor did they get to the work.

At the latter part of the month, Mr. Seth Perkins, one of the firm, was here and made certain statements concerning the difficulty of getting a plant from New York at this season of the year on account of the storms or the liability to storms. This is apt to be misleading; a reliable party owning and operating dredges informed me that this is not considered a difficult place to reach. A plant can be taken to Watch Hill without any risk and it can remain there for a favorable day to come around into the bay.

During the month of December, 13,406 cubic yards of material were removed; 9 working days were lost; of these four were consumed in trying to get supplies in Providence, but which would not be furnished unless paid for. On the 29th ult. one of the scows was con-

demned, as it could not hold any of the material put into it. As the plant was not increased, under the authority granted in the 6th indorsement on letter referred to, the contract was annulled by written notice directed to the contractors on the 1st instant and to the surety company on the bond, copy of which notice is herewith.

Very respectfully, your obedient servant,

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.

108 2 inclos.

Through Col. G. L. Gillespie, Corps of Engineers, U. S. A., Division Engineer, Northeast Division.

The following is a copy of Exhibit B:

Subject: Contract for dredging. Providence River.

WAR DEPARTMENT,
Washington, January 30, 1901.

(File No. 4510–7 of 1900.)

SIR: Referring to previous correspondence regarding your contract for dredging in Providence River, and replying to your letter of 11th instant, in which you state that no estimate has been received for the past three months, I beg to inform you that Major Geo. W. Goethals, the local engineer officer to whom the matter was referred, reports under date of 21st instant, as follows:

"There was due Perkins & O'Brien under their contract at the time of its annulment the sum of $2,514.28. Of this amount $2,236.87 was earned after steps had been taken to terminate the contract and under which circumstances I was not warranted in the interests of the United States to make payment. The writer can hardly, in justice, contend that this comparatively small sum could have secured the additional plant on which the continuance of the contract depended."

Very respectfully,

ELIHU ROOT,
Secretary of War.

Mr. JOHN J. O'BRIEN,
253 Broadway, New York, N. Y.

Perkins & O'Brien worked on this dredging contract right
109 up to the 1st of January. They worked right up to the time of the annulment. I did not stop their working after the 1st of January. I believe they stopped of their own accord. I do not know about that.

The total retained percentages on this contract is $5,409.09. That is made up of 10 per cent retained out of each monthly payment from the beginning of the contract up to the payment of July 17th, 1900. The vouchers show payment for board as well. This is just for dredging. Ten per cent of the amount due for dredging for each month from the beginning of the work March 1st, 1899, up to the payment of July 17th, 1900. That was for work done in the month previous. The amount earned for dredging for the three

months September, October, and December, 1900, was $2,793.64. There was no deduction of ten per cent for those months. That was the gross amount for the dredging and $97.67 for board furnished the inspectors.

This new contractor, The International Dredging Company, began work about April 1st, 1901, and completed September 30, 1902.

This was my first duty in connection with dredging contracts on the coast. It was my first experience of this particular class of dredging work. Major Lockwood was practically my predecessor in charge of this work. He had been the engineer in charge for five or six years. This work was let under him, and the work was done under his supervision up to the time of his relief from there. He left Newport in July. I don't remember the date of the letting of the contract. Recalling that the contract was let on November 19, 1898, Major Lockwood left Newport about 17 or 18 months after the letting of the contract. Major Lockwood, if my memory serves me correctly, had been the engineer in charge at that place and of this class of work very nearly six years. I don't understand what you mean by that class of work. Now, dredging in a river is much the same as dredging on the seacoast, excepting that you do not allow for tides. If he has been in charge of a district on the seacoast, I can not answer that question; but he has been in charge of dredging on the Lakes and on the Ohio River just as I was in charge of dredging on the Tennessee and Ohio River earlier. Dredging is the same whether on a river or ocean bar except as regards the tides. It may also differ as to the effect of storms on the progress of the work depending on the reach of the river. In the case of dredges having to be moved from point to point the difficulty or danger may be greater on an ocean coast than it is in a river like the Tennessee—but the Tennessee is a pretty treacherous river on account of the shoals. That would be merely a matter of channels and a matter of winds in certain sections on the lower portion of the river.

I don't remember the date of reletting this contract.

I think it was about March 13, 1901, and it was completed in practically 18 months from that date. Nineteen months practically from about the 1st of April, the time they began.

I drew the specifications on which the contract was relet, or they were done in the office.

We were required by the instructions from Washington to give the new contractor practically the same time for the remaining amount of material as contemplated under the original contract with Perkins & O'Brien. I believe the only variation is some specification in the character of material that was required to be removed. I think there was a variation in that respect, because we knew more about the nature of the bottom. As a result of the work that Perkins & O'Brien had done we had ascertained in so far as the character of the material was concerned more about the conditions that had to be contended with and took those into account in drawing the specifications

for the new contract. I think we made a change in the
111 specifications for the new letting as to the character of the material to be removed. It is my impression the change made was that we allowed for mud. I don't think the original specifications contemplated anything but sand and a mixture of sand. I am not certain of that, however.

When we treated the new contract as having been completed about 18 months after the new contractors began work, it turned out that they had not been required to remove nearly so many cubic yards as the estimates that we had made for removal by Perkins & O'Brien; they had removed in the neighborhood of 10 per cent less than those estimates. When I made my estimate or calculation as to what remained to be removed it was in fact about 10 per cent less than that, so that if Perkins & O'Brien had been allowed to continue for the remaining 18 months of their contract they would practically only have had to remove about 90 per cent of what I then figured or calculated remained to be removed.

Almost immediately on entering on my duties at Newport I took up the consideration of this contract and the way it was being performed. I don't remember whether when I wrote my letter of October 15th to General Wilson, I sent a copy of it or communicated its contents in any way to Perkins & O'Brien. I rather have an impression that they were notified that I would make an annulment of the contract if certain conditions were not complied with. I don't think I sent them a copy of my letter of October 15th to General Wilson or communicated its contents to them as having been sent to him.

I had an interview with Mr. Perkins, but whether within those dates, October 15th and December 4th, I am not certain. I am not certain whether my interview with Mr. Perkins was between Decem-
ber 4th and December 31st after my letter of December 4th. I
112 rather imagine it was Mr. O'Brien I saw between those dates and Mr. Perkins before that date. I don't remember having a conversation with Mr. Perkins between December 4 and before December 31st in regard to negotiations he had had with the owners of dredges then located at Boston. I remember having had a conversation with Mr. Perkins in regard to getting some dredges somewhere, but I don't remember the date. It may have been subsequent to the 4th of December or may have antedated it.

I wrote my letter of December 4th and followed it up by my letter of December 31st annulling the contract because under the first letter I was authorized by the Chief of Engineers to inform the contractor that unless certain conditions were fulfilled I was under that same authority authorized to annul the contract on the 1st of January. When I say I was authorized by the Chief of Engineers, I refer to the endorsements on my letter of October 15th which are given in evidence; that was my authority. I wrote my letter to the Chief Engineers, dated October 15th, and my letter of December 4th, saying that I would annul this contract, or that I thought it ought to be

annulled, because the contractors had failed to prosecute the work diligently. I had every reason to believe that they were either financially unable to carry the work to a conclusion or that they were unwilling to advance the necessary money to do this. When I say I had every reason to believe that they were financially unable or unwilling to do this, I mean that it was my own opinion. Nothing excepting as I testified to on the facts in relation to the doing of the work that is the attachment of the dredge, losing the scows. What I did was to exercise my own judgment as the engineer in charge and terminate this contract and annul it under the terms of the contract itself as I understood it. That was what I was doing.

113 On January 2, 1901, I wrote a letter to Brigadier-General John M. Wilson, in which I stated that Mr. Perkins, of Perkins and O'Brien, had been to see me during the month of December with reference to getting additional dredges upon the work.

After that letter of December 4th Mr. Perkins came down from Boston to see me at Newport and had a conversation with me about trying to get additional dredges to work there.

It is a fact that although this contract was let originally to Perkins & O'Brien in November that it provided that work should not be begun under it until the 1st of the following March.

Q. Is not it a fact that in contracts of this character it is not usual to expect the same amount of work to be done during the winter months as are done during the spring, summer, and fall?

A. I do not know that in that portion of the river at Narragansett Bay, except for interference by ice, that there should be any unnecessary delays due to the weather.

I cannot say that it was the custom with the Government in carrying out contracts of this kind. The date of letting the new contract was March. I advertised the specifications 30 days before that. My advertisement for the specifications did not begin in February. You see there is considerable time consumed. In the first place after the annulment of the contract the specifications must be drawn to be forwarded to Washington for approval by the proper authorities. After they have been approved necessary authority must be obtained for publishing the advertisement. After the bids are received they must be forwarded to Washington for authority to enter into contract, so that considerable delay occurs in that way. They have the date on the specifications. Do you mean after the opening of the bids?

In the letter of October 15, 1900, this language is used, "The

114 funds available now are sufficient to dredge upwards of one million cubic yards, which would require dredging 100,000 cubic yards per month from now until next March, when further appropriations may be expected." That is an extract from Colonel Lockwood's letter, which I quoted in my letter to the Chief of Engineers. The term funds available means this. This was a continuing contract on big work such as this for which they appropriate a certain specified sum to be expended, with authority to enter into contract

for another amount—a larger amount—which will be provided for by subsequent appropriation, and subsequent appropriations are made in the sundry civil bill. I presume Major Lockwood had reference to that, that another appropriation had been made. The contract provided that in case of failure of Congress to provide the necessary funds certain steps should be taken, etc. It was because these funds were then available that this estimate of 100,000 cubic yards was made.

When I said in my examination in chief that I had the sanction of the Chief of Engineers to my letter of December 4th and my subsequent letter of annulment of December 31st, I referred entirely to the endorsement on my letter of October 15th.

I said in my examination in chief that the total amount to be excavated under the Perkins & O'Brien contract was two million and thirty-nine thousand and some yards to be done in 40 months' time. That two million and odd yards means the estimated amount in the original estimate on which Perkins & O'Brien bid, and it turned out to be some 10 per cent less than that. In half that time they had removed one-quarter of that amount. There is no question that if they had provided after December 31st or prior to December 31st an adequate number of dredges that they could have completed the work within the time of their contract and the contract would never have been recommended for annulment under those circum-
115 stances.

There were some thousands of dollars in the hands of the Government to which they ultimately were to become entitled by reason of this reserved percentage and the estimates that had been made that they would have had if they had completed the contract. They had given a bond with this surety company for the completion of the contract and they still had 18 months in which to complete it and that was time enough if they provided adequate dredges for them to complete it.

I had some correspondence and interviews with the International Dredging Company about dredges. They came to see what arrangements the Government would and could make for the Government paying them for any work that their dredges might do, in case they turned dredges over to Perkins & O'Brien for the completion of their contract. That was in some indorsement on the report of the Chief of Engineers, I think in the letter of October 15th. I had an interview with Mr. Perkins on the 20th of November, 1900, in which he informed me that they were arranging with the International Contracting Company and Mr. Packard for additional dredges to be put on the work. My interview with the International Contracting Company must have been sometime subsequent to that, or perhaps prior to it, but in that neighborhood in November. I believe Perkins & O'Brien were negotiating with this company with the idea of getting them to furnish additional dredges on the work. I had no personal disagreements with O'Brien or Perkins, absolutely no personal feeling about this matter. It was simply a question of a

contract and its carrying out and my duty as I saw it. When we readvertised this work we had three bids.

The work on this upper reach for which the new contract was made was harder work than that Perkins & O'Brien had done
116 on that same reach. Perkins did the upper part of the reach and the lower part, leaving the intermediate part. They stopped working at the upper part when they struck the hard material and asked permission to go to the lower reach.

I did not give any notice to Perkins & O'Brien of the intention to relet this contract or of its reletting.

Redirect examination by Mr. DENISON:

I don't remember exactly the conversation I had with the representative of the International Contracting Company about the possibility of their providing dredges for Perkins & O'Brien, but I told them and also Mr. Packard, who interviewed me on the same ground, that I could not accept under the Treasury Department regulations a power of attorney from Perkins & O'Brien to pay them for anything and that there was no other way under the regulations by which I could divert any funds due Perkins & O'Brien to any sub-contractors. I mean a power of attorney to pay the contracting or Packard money. Packard was another dredge owner in Providence and also interviewed me in regard to the matter of securing government payment direct for any loan of dredges.

When I made this computation of what was supposed to be the amount of work remaining to be done, when Perkins & O'Brien quit, it was my honest opinion as to the amount remaining. Ten per cent in such a case as that is rather a close estimate.

Mr. SWIFT. I want to object to one statement in that question, and that is the amount after Perkins & O'Brien quit. I don't understand it was claimed that they ever quit until they were to be put off.

The COURT. That will be understood.

117 The estimates stated in these contracts are stated to be merely approximate and merely estimates and not positive limits. We can not without close survey and very expensive cost determine accurately just how much is to be done.

I don't understand what you mean by asking "Do you know how much would be necessary to be done in the remaining time in order to accomplish the work which actually was done?" I stated that it would be necessary to have an equipment to do 100,000 cubic yards a month in order to do what I figured to be necessary to be done. I do not mean by that to imply that it would be necessary to do that amount every month remaining in order to accomplish the work. I said 100,000 because dividing the time remaining into the amount of material still to be dredged practically gave that figure. After the completion of the dredging there is a great deal of going over the ground, and we had to allow time for that.

There is a difference in the possibilities of dredging at different times of the year in case of ice forming in the river. It depends on

circumstances whether we expect people to dredge as much in the winter months as in the summer months. If the winter is open we do. There ought to be no difference except for days of storms, and those we can not count on.

After the regular retained percentages I first retained the money that was due them for dredging in September. If I had paid them for that work in September I would have paid them about the middle of October, but as I had then made up my mind to annul the contract under the Treasury Department rulings, I considered I had no right to pay them. I made up my mind in October that that contract should be annulled in the interest of the Government and of navigation.

118 GEORGE W. GOETHALS, recalled:

Examined by Mr. DENISON:

The paper which you show me, entitled second endorsement, transmitting a paper—returning a paper received from the Secretary of War's office back to the Secretary of War with an endorsement to the effect that on December— it is from General John M. Wilson, Chief of Engineers, to the Secretary of War. That is John M. Wilson's signature. He was Chief of Engineers at that time. That paper has all the marks of being a part of the official files of the War Department.

(Paper offered in evidence.)

Mr. SWIFT. I object to the endorsement unless offered in connection with the paper on which it is an endorsement.

Mr. STIMSON. We consent that the whole paper should go in.

(Marked "Exhibit 13.")

The following is a copy of Exhibit 13:

Sheehan & Collin. Cable address "Willichan, New York."
William F. Sheehan, 32 Nassau street.
Charles A. Collin, New York, Dec. 28, 1900.
Thomas L. Hughes.
Charles H. Weiner.
Dec. 29, 1900. Office Secretary of War.
Chief clerk, Dec. 29, 1900. War Dept.

Hon. ELIHU ROOT,
Secretary of War, Washington, D. C.

MY DEAR MR. ROOT: The firm of O'Brien & Perkins, in
119 which my brother is interested, have a government contract for dredging at Providence, Rhode Island. The engineer in charge has directed that another dredge be put into service by the first of the year, and that unless this is done, work may be suspended. They are making every effort possible to secure another dredge, but this will necessarily take a short time. They promise me that they will surely have another dredge by February 1. If there is anything which can be done to help them out in the matter, I will appreciate it.

Yours, truly,

W. F. SHEEHAN.

[Second Indorsement.]

OFFICE CHIEF OF ENGINEERS,
U. S. Army, January 5, 1901.

Respectfully returned to the Secretary of War.

Mr. Sheehan's letter was received in this office January 2, 1901.

On December 31, 1900, the local officer in charge, Major Geo. W. Goethals, Corps of Engineers, stationed at Newport, R. I., with the sanction of the Chief of Engineers, formally annulled the contract for failure of the contractors to faithfully and diligently prosecute the work as required by terms of the agreement. Attention is invited to the report of Major Goethals, dated January 2, 1901, and its accompanying papers.

JOHN M. WILSON,
Brig. Gen., Chief of Engineers,
U. S. Army.

28734
28
Inclos. 29–31 accompanying.
Recd. Record Div.
120 Jan. 7, 1901:
Back. War Dept.
Recd. Record Div.
Jan. 12, 1901:
Back. War Dept.
Recd. office Chief of Engrs. Jan. 16, 1901.

(Government rests.)

Mr. SWIFT. I move to dismiss this action. My first ground is on the ground of failure on the part of the Government, and its breach in not making payment to Perkins & O'Brien, at least for the months of September and October.

The second ground is based upon the question of annulment, and my contention is that the contract is either a liquidated damage or a specified penalty contract. In other words, a contract in which the amount which Perkins & O'Brien should suffer in case of an annulment was specifically stated and liquidated in the contract.

My next point is that the contract was annulled before the day designated.

My next point is that the contract, so far as it is operative under this case, is a liquidated damage contract, and that the amount of damages to which the plaintiff is entitled is specified in the contract and that the plaintiff cannot recover any more than the amount forfeited, to wit, $5,000, or whatever money was properly in the hands of the Government at the time.

My next ground is that the contract does not provide any authority in the engineer to designate any amount of work to be done within any specified time, and that the demand of the engineer in charge that these men, in order to satisfy him, should have

121 upon the work three dredges to do 100,000 cubic yards per month was not authorized and they were not bound to comply therewith, and it was no breach of the contract on their part in not complying with it.

My next ground is that there is no claim in this case that there was an abandonment of the contract, and consequently the recovery can not be had on any abandoned contract claim, but must be upon the strict terms of the contract itself.

My next ground is that the Government having retained the penalty which it was authorized to retain has exercised the sole and exclusive and entire right it had under the terms of the contract.

My next ground of dismissal is that they had no proof of any proper sanction of the Chief of Engineers.

My next ground is that there was no notice to the Surety Company of the readvertisement or reletting of this contract; no call upon the Surety Company to protect its interests and no opportunity given to it to save itself from loss and damage, and that the Government was bound to give to the Surety Company that opportunity and call upon it to complete that contract in case it desired to hold it responsible for any future deficiency; that the annulment of the contract was notice to the Surety Company that the contract was terminated, and receiving no further notice, I claim the Surety Company was relieved from any further liability.

My next ground is that the action of the engineer in charge was unreasonable; that there was time sufficient for the contract to have been completed easily within the time remaining, and that it
122 could have been completed in less time, and it was unreasonable action on his part to have taken an annulment of this contract until there was such a short remainder of time which would lead a reasonable man to suppose it was impossible to have completed the contract. Also that the time of the year was an improper time for this engineer to require them to bring new dredges upon this work in that neighborhood.

My next ground is that the terms of the contract made by the Government with the new contractors were materially different from the terms of our contract, and that these changes necessarily caused additional burdens upon the new contractors and increased the cost of doing the work, and that said changes and modifications were made without the consent of the principals, Perkins & O'Brien, or the surety, and released them from all liability for any increased cost.

My last ground is that the complaint itself designates that part of the contract on which this claim is made, and the complaint having designated that specific clause of the contract, that is the clause that must bind the plaintiff in this action and not any other clause of the contract.

The COURT. Motion granted, and the complaint is dismissed on the merits as to both defendants.

Mr. DENISON. The Government excepts.

123 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
JOHN J. O'BRIEN, INDIVIDUALLY AND AS MEMBER of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia.

It is hereby stipulated that the aforegoing bill of exceptions to be settled and signed as a true and correct record in the form proposed, and that the same be ordered on file by the trial judge herein as a part of the record.

HENRY L. STIMSON,
Attorney for United States.
FREDERIC J. SWIFT,
Attorney for Defendants.

The foregoing constitutes all the evidence and proceedings on the trial of the action, and forasmuch the exceptions, matters, and things would not otherwise appear in the record, I have settled and signed this bill of exceptions on the prayer of said plaintiff by its counsel, and it is

Ordered, That the same be filed as part of the record herein.

Witness my hand and seal this 21st day of

C. M. HOUGH,
U. S. District Judge.

124 (Endorsed:) United States Circuit Court, Southern District of New York. United States of America against John J. O'Brien, individually, etc., and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia. Bill of exceptions. Henry L. Stimson, U. S. attorney. U. S. Circuit Court, Southern District New York. Filed Apr. 22, 1908. John A. Shields, clerk.

125 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN J. O'BRIEN, INDIVIDUALLY AND AS a member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Company of Philadelphia, defendants.

Comes now the plaintiff and files the following assignment of errors upon which it will rely:

1. That the United States Circuit Court in and for the Southern District of New York erred in dismissing the complaint; for the reason that under the proofs and under the proper interpretation of the contract and the bond, the defendants were liable for the amount of the demand, and for the further reason that the proofs constituted a valid cause of action for the relief demanded.

HENRY L. STIMSON,
U. S. Attorney, Attorney for Plaintiff.
(Office and post-office address, Room 50, Post-Office Bldg., Borough of Manhattan, city of New York.

126 (Endorsed): U. S. Circuit Court, Southern District of New York. United States of America, plaintiff, vs. John J. O'Brien, individually and as a member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, defendants. Assignment of errors. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, Southern District of New York. Filed Apr. 17, '08. John A. Shields, clerk.

127 By the honorable Charles M. Hough, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the city of New York, in the district and circuit above named, on the 15th day of May, 1908, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the United States of America as plaintiff and you are defendants to show cause, if any there be, why the judgment in said writ of error mention should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 17th day of April, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-second.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

128 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The United States of America, appellant, vs. John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Co., of Philadelphia, appellant. Citation. Henry L. Stimson, U. S. attorney, attorney for United

States. Due service of a copy of within is hereby admitted. Dated Apr. 17, '08. F. J. Swift, atty. for deft. Farrelly & Co. and on behalf of O'Brien. U. S. Circuit Court, Southern District of New York. Filed Apr. 21, '08. John A Shields, clerk.

129 United States Circuit Court of Appeals for the Second Circuit.

No. 269. October term, 1907.

Submitted May 20, 1908. Decided May 20, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
JOHN J. O'BRIEN, INDIVIDUALLY, ETC., AND Stephen Farrelly as ancillary receiver, etc., defendants in error.

In error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

Per curiam: The facts are the same as when these cases were here before; our former opinion was filed December 7th, 1908. Upon the second trial the Government amended the complaints by reducing the amount of its claims. This enabled defendants to include among the grounds upon which they moved for direction of verdict in their favor the following: "the Government having retained the penalty which it was authorized to retain has exercised the sole and exclusive and entire right it had under the terms of the contract." The decision of the trial judge in granting this motion was in accord with the opinion of a majority of this court as indicated in the former opinion.

Judgment affirmed.

Submitted without argument.

130 At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 1st day of June, one thousand nine hundred and eight.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,
vs.
JOHN J. O'BRIEN, INDIVIDUALLY, ETC., and Stephen Farrelly as ancillary receiver, etc., defendants in error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be and it hereby is affirmed.

E. H. L. It is further ordered that a mandate issue to the said Circuit Court in accordance with this degree.

131 (Endorsed:) United States Circuit Court of Appeals, second circuit. U. S. vs. J. J. O'Brien & ano. Order for mandate. United States Circuit Court of Appeals, second circuit. Filed June 2, 1908. William Parkin, clerk.

132 United States Circuit Court of Appeals, Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below),
vs.
JOHN J. O'BRIEN, INDIVIDUALLY AND AS A MEMBER of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Company of Philadelphia, defendants in error (defendants below).

Comes now the plaintiff and files the following assignment of errors, upon which it will rely:

1. That the United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the Circuit Court dismissing the complaint; for the reason that under the proofs and under the proper interpretation of the contract and the bond the defendants were liable for the amount of the demand and for the further reason that the proofs constituted a valid cause of action for the relief demanded.

HENRY L. STIMSON,
U. S. Attorney, Attorney for Plaintiff in Error.

(Office and post-office address, room 50, post-office bldg., Borough of Manhattan, city of New York.)

133 SIR: You will please take notice that a , of which the within is a copy, was this day duly entered in the within-entitled action in the office of the clerk of the .

Dated, N. Y., , 190 .

Yours, etc.,

U. S. Attorney, Attorney for Defendant.

To , attorney for .

(Endorsed:) Form No. 336. U. S. Circuit Court of Appeals, 2d Circuit. United States of America vs. John J. O'Brien, individually, etc., and Stephen Farrelly, as ancillary receiver of the City Trust, Safe Deposit & Surety Company of Philadelphia. Assignment of errors. Henry L. Stimson, United States attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, , 190 . , attorney for . To , attorney for . United States Circuit Court of Appeals, Second Circuit. Filed Dec. 3, 1908. William Parkin, clerk.

134 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 131, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States against John J. O'Brien, individually, etc., and Stephen Farrelly, as ancillary receiver, etc., as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 3d day of December, in the year of our Lord one thousand nine hundred and eight and of the independence of the said United States the one hundred and thirty-third.

[SEAL.] WM. PARKIN, *Clerk*.

135 UNITED STATES OF AMERICA, ss:

To JOHN J. O'BRIEN, individually, and as member of the firm of Perkins & O'Brien, and STEPHEN FARELLY, as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 23d day of November, in the year of our Lord one thousand nine hundred and eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

136 Service of a copy of the within citation is hereby admitted. Dated N. Y., November 25, 1908.

F. J. SWIFT,

Attorney for John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, Defendants in Error.

On this day of , in the year of our Lord one thousand nine hundred and , personally appeared before me, the subscriber, . and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the day of . A. D. 190 .

137 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between The United States, plaintiff in error, and John J. O'Brien, individually, and as member of the firm of Perkins & O'Brien, and Stephen Farrelly as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of November, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

138 Service of a copy of the within writ of error is hereby admitted. Dated N. Y., Nov. 25, 1908.

F. J. SWIFT,

Attorney for John J. O'Brien, individually and as member of the firm of Perkins & O'Brien, and Stephen Farrelly as ancillary receiver of the City Trust, Safe Deposit and Surety Company of Philadelphia, Defendants in Error.

139 In the Supreme Court of the United States.

October term, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN J. O'BRIEN, INDIVIDUALLY, ETC., ET AL. } No. 635.

Stipulation as to addition to record.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the opinion of the United States Circuit Court of Appeals for the Second Circuit, known as the first opinion, and the dissenting opinion, hereto attached, shall be added to the original transcript of the record now on file in the Supreme Court.

H. M. HOYT,
Solicitor-General.
GEORGE A. KING,
Counsel for Defendants in Error.

MARCH 27, 1909.

140 United States Circuit Court of Appeals for the Second Circuit.

Nos. 92 and 93. October term, 1907.

Argued December 3, 1907. Decided January 7, 1908.

STEPHEN FARRELLY, AS ANCILLARY RECEIVER, ETC.,
plaintiff in error,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

JOHN J. O'BRIEN, INDIVIDUALLY, ETC.,
plaintiff in error,
vs.
THE SAME, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

This action was brought by the United States against O'Brien, successor of Perkins & O'Brien, contractors, and the City Trust Company, surety under a contract for dredging Narragansett Bay and Providence River. Recovery was had for amounts earned but not paid and for what the work actually cost the Government after O'Brien was put off it, as against O'Brien $73,578.76 and as against the company $27,242.45. Each defendant sued out a writ of error.

141 LACOMBE, Circuit Judge:

The contract was entered into November 16, 1899; by it the parties of the second part agreed to furnish the necessary equipment and do all the work of dredging required in a certain part of Narragansett Bay, in accordance with specifications attached. In consideration of the parties of the second part performing the required work (removing about 2,056,491 cubic yards of material) the party of the first part agreed to pay at the rate of $10\frac{8}{10}$ cents per cubic yard. All materials and work before acceptance were to be subject to a rigid inspection, and the decision of the engineer officer in charge as to quality and quantity was to be final. It was provided that payments should be made monthly, when funds are available, 10 per cent being reserved. Also that "the said Perkins & O'Brien shall commence work on or before the first day of March, 1899, and shall complete the work on or before the first day of July, 1902."

Work was begun on March 1, 1899, and, although at the outset it was apparently pushed sufficiently to satisfy the engineer officer in charge, after several months the rate of progress was such that he repeatedly called upon the contractors to increase their monthly output, and finally, on December 31, 1900, sent a letter to each of the principals and to the surety formally notifying them that the work under the contract had not, in his judgment, been prosecuted faithfully and diligently and that the contract "is hereby annulled." At that time there had been 526,708 cubic yards in all removed, 13,406 in the current month; the engineer supposed there was about 1,500,000 yet to be taken out, but in reality there was only 1,300,000; it was, as the engineer testified, "a very possible thing, easily accomplished, for any one to have completed that contract within eighteen months if they had the plant. * * * My judgment was that these men could not control sufficient plant to complete what remained to be done * * * in the remaining time." Since the most important question in the case deals with the results of such annulment, it will be first considered.

The contract contains the following clause, which is found near the close of the document:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract
142 as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and

that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

Earlier in the contract, and immediately after the clause providing for the beginning and completion of the work, is found the following clause:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed (i. e., the engineer officer in charge), shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States."

The section of the Revised Statutes referred to provides that all purchases and contracts for supplies or services shall be made by advertising a sufficient time for proposals when the public exigencies do not require immediate delivery or performance. And that when the public exigency requires the same may be obtained by open purchase or contract without advertisement.

The notice of annulment of this contract was given under the clause last-above quoted.

143 It will be seen that in the event of a "failure to complete the contract as specified and agreed upon" all sums due and percentage retained are forfeited and the United States is also entitled to recover all damages in excess of such forfeiture due to such failure, including the excess cost of completion. Inasmuch as a stated time is given for completion, it would not ordinarily be possible to declare that there had been a failure to complete until the time given for such completion had elapsed. It might frequently cause great embarrassment to the Government if it should be required to wait till the day when the breach was complete, especially when the conduct of the contractor and the manner in which he was prosecuting the work indicated that he would not complete it on the day named. In order, therefore, to provide for such a contingency, the annulment

clause was inserted, giving to the engineer officer the right to terminate the contract in advance of the time allowed for its fulfillment whenever in his judgment the contractor may fail to prosecute the work faithfully and diligently. This clause, while no doubt necessary, is a drastic one; it allows the Government to terminate the contract although—as was the case here—the contractor could easily have fully completed the work in the time yet left had he mended his ways and been allowed to continue. Moreover, while in one sense it may be said that a contractor who fails to prosecute the work faithfully and diligently for part of the time allowed him is not doing what the contract impliedly requires him to do, nevertheless, where there is no clause in the contract directing that he shall perform some specified part of the work within some specified time, or even that he shall do some work each month, it can hardly be said that he has broken the contract just because he has been so slothful during the first half of the period allowed him that he will have to be very much more diligent during the remainder of the period in order to fully complete the work on time. Since this clause is thus drastic and permits the Government to terminate the contract while the contractor is still able to complete, and by such completion avoid a breach of its provisions, it might be expected that the damages to be assessed against him would not be so heavy as those provided for when he has actually failed to complete the contract as specified within the time
144 allowed. Reference to the clause shows that it contains no words calling for damages arising from excess cost of completion; it reads merely: [upon annulment] "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

It is assigned as error that the judgment entered against plaintiffs in error included damages arising from excess cost of completion, and in the opinion of a majority of the court the point is well taken. The general provision in the later clause for forfeiture and damages "in case of failure to complete as specified and agreed upon" does not apply, because on January, 1901—a year and a half before the expiration of the time limited—there had not been a "failure to complete," and because the annulment clause does not refer to the later provision, but provides its own punishment for the negligent contractor, viz, exclusion from the work and forfeiture of all sums due him. If the rule for assessing damages were to be found in the general clause, it is difficult to understand why the draughtsman dealt with that subject in the annulment clause. Being a form prepared by the party of the first part, and in the preparation of which the contractor took no part, any ambiguities in its language are to be construed against the party preparing it. But we find no ambiguity; the expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled.

It will not be necessary to review in detail the many authorities cited in support of the judgment; those in which there was a completed breach of the contract and those where the contract did not in terms provide for just what should be the consequences in the event of annulment in advance of the time allowed are not persuasive here. In one of them (U. S. v. Maloney, 4 App. Cas. D. C., 505) the contract was identical with the one at bar. The point here raised is not discussed at length, the court holding that "the annulling of the contract under this power reserved to the Government certainly does not exonerate either the principal or his sureties from liability for all prior breaches of the contract. Such annulment in no manner affects the obligation under the contract that had accrued prior to that time."

In the Maloney case the contractor wholly failed to do any
145 work whatever; he wholly failed to "commence work on or before the 16th day of June, 1891," which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause.

It is further contended that the reference in the annulment clause to section 3709 of the Revised Statutes "inevitably implies" a right to general damages beyond those stipulated for in such clause. We are unable to concur in this proposition. The reference to section 3709 may be sufficiently accounted for on the theory that the contractor is thus forewarned that in case of annulment he must leave the work at once, because his successor may be selected and sent there without the delay resulting from re-advertisement. Moreover, where the context specifically describes the consequences to the contractor implication must be of the clearest to warrant any addition to the enumeration.

In the views above expressed as to the construction of the contract only a majority of the court concur.

It is not disputed that at the time of annulment the Government had not paid the monthly estimates for work done in September and October. (No work was done in November.) Without discussing the question whether or not these failures of the Government to carry out the terms of the contract were justified by prior default of the contractors, the point here raised may be disposed of by the statement that the contractors at no time elected to treat any such failure as a breach; they did not even notify the engineer officer that without payment they would be unable to proceed with the work; they chose, as they had a right to do, to continue work after the nonpayments directly up to January 1, 1901, thus continuing the burden as well as the benefit of such further performance and disregarding the breach so far as it might excuse them from such further performance.

Objection was raised on motion to dismiss and reserved by exception that there was no proof of any written sanction of the Chief of Engineers, but the contract nowhere requires that such sanction shall be expressed in writing. Nor do we find that the annulment was premature. Contractors were notified on December 4, 1900, that

unless they have on the work by January 1, 1901, a sufficient
146 plant to dredge at least 100,000 cubic yards per month the contract would be annulled. The final notice of annulment was mailed to them on December 31st and not received until January 1st. The case is distinguishable from King v. U. S. (37 Ct. of Cl., 438), in which on the named day the contractor appeared with a suitable force; here no plant sufficient to dredge at least 100,000 cubic yards a month was put or sought to be put on the work on January 1st. There was no evidence introduced or offered tending to show that in exercising his judgment, as he did, the engineer officer did not act with fairness and good faith.

The judgment is reversed and cause remanded for a new trial.

F. J. Swift, for the plaintiff in error, No. 92. J. C. Browne, for the plaintiff in error, No. 93. Winfred Denison, assistant U. S. attorney, for the defendant in error.

A true copy.

[SEAL.]

WM. PARKIN, *Clerk.*

147 United States Circuit Court of Appeals for the Second Circuit.

Nos. 92 and 93. October term, 1907.

Argued December 3, 1907. Decided January 7, 1908.

STEPHEN FARRELLY, AS ANCILLARY RECEIVER, ETC., plaintiff in error,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

JOHN J. O'BRIEN, INDIVIDUALLY, ETC., PLAINTIFF in error,
vs.
THE SAME, DEFENDANT IN ERROR.

In error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

WARD, Circuit Judge:

I do not concur in the opinion of the court so far as the annulment clause of the contract is concerned. It necessarily implied a covenant on the part of the contractors to prosecute the work "faithfully and diligently" and made the Chief of Engineers the absolute judge of performance. He decided that they had broken the contract in this respect, and therefore annulled it. The United States is accordingly entitled to compensation, which is in this case the excess
148 over the contract price paid to new contractors to whom the work was re-let, unless its right to compensation has been contracted away.

The opinion of the court treats the provision that upon annulment "all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be or become forfeited to the United States" as if it were a provision for liquidated damages. I think it a penalty and that the measure of damages is the usual one, viz, compensation which may be more or less than the forfeiture. As a measure, forfeiture would be most unsatisfactory—inadequate if the annulment were declared early in the work and perhaps excessive if declared later. The reference to section 3709, U. S. Revised Statutes, authorizing the United States to re-let the work without advertisement if the public exigencies demand it strongly confirms this opinion. It is not satisfactorily explained as a warning to the contractors that they may have to leave the work at once if the United States re-let without advertisement, because upon the annulment of the contract they would have to leave whatever course the United States pursued in respect to re-letting. Unless the contractors were to be liable for the loss, if any, of re-letting, I do not see why the statute was referred to. The judgment should be affirmed, with, however, a deduction of the amount of the reserved percentages, $5,409.99, in favor of the principal, John J. O'Brien.

A true copy.

[SEAL.] WM. PARKIN, *Clerk.*

149 (Indorsement:) File No., 21431. Supreme Court U. S. October term, 1908. Term No., 635. The United States, plaintiff in error, vs. John J. O'Brien, individually, etc., et al. Stipulation of counsel and addition to record. Filed April 2d, 1909.

(Indorsement on cover:) File No., 21431. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 303. The United States, plaintiff in error, vs. John J. O'Brien, individually, and as member of the firm of Perkins & O'Brien, and Stephen Farrelly, as ancillary receiver of The City Trust, Safe Deposit & Surety Company of Philadelphia. Filed December 4th, 1908. File No., 21431.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN J. O'BRIEN, INDIVIDUALLY AND AS a member of the firm of Perkins & O'Brien; and Stephen Farrelly as ancillary receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia.
No. 108.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

This writ of error is to review a decision affirming a judgment dismissing the complaint on the merits. The action was brought by the Government to recover damages upon a contract for dredging in the Providence River, Narragansett Bay. The original defendants were Perkins, O'Brien, and the Surety Company, but a severance was had as to Perkins (fol. 53), and the Surety Company was replaced by its ancillary receiver, Stephen Farrelly (fol. 32). The

court below decided the case on the ground that under the contract as construed there had been no breach, and also in effect that it was a liquidated damage contract.

The point was originally raised by a demurrer, which was heard by Judge Hazel and decided in favor of the Government. (143 Fed. Rep., 688.)

Answer was then interposed and the case went to trial before Judge Hough, where a verdict was directed in favor of the Government.

A writ of error was taken by the defendants from this judgment and the judgment was reversed, Judge Lacombe and Judge Coxe concurring in an opinion (fols. 141 to 147, reported, 159 F. R., 671) in which they construed the contract against the contention of the Government. Judge Ward dissented (fols. 147 to 149).

The case was then retried and the complaint was dismissed on the merits (fol. 122).

The judgment of dismissal having been affirmed by the Circuit Court of Appeals (fol. 129) upon their former opinion, this writ of error was sued out.

THE CONTRACT.

The contract on which the action was brought is set forth in full, together with the advertisement and specifications and general conditions, which it incorporates, at folios 11 to 27 of the transcript of record. Its whole scope is important to be considered, as not only the spirit but numerous particular clauses are illuminating.

In substance it provided that Messrs. Perkins and O'Brien were to furnish the necessary equipment and do all the work of dredging required in improving the Providence River, in Narragansett Bay, Rhode Island, between specified points (fol. 23).

The actual work was to be commenced on or before March 1, 1899 (fols. 19–24), and to be completed by July 1, 1902 (fols. 19–24). If operations were suspended awaiting appropriations, the contractor was to resume work within thirty days after notification that funds were available (fol. 19).

The specified price was 10.8 cents per cubic yard (fol. 23); payments to be made monthly and to be based upon amount of material removed (fols. 26–16), 10 per cent being reserved until the total amount thus retained should be equal to 10 per cent of the cost of completing the remainder as estimated by the engineer officer in charge (fol. 16). All the work was to be done under the supervision of an officer of the United States engineers, under whom there were to be inspectors, and who was to be arbitrator as to performance (fols. 18, 19, 20, 23, 24).

The contract proceeded as follows in a clause which will hereinafter be referred to as "Clause A," and which was one of the specific clauses construed:

("Clause A.")

> (If,) in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein,

> or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (fol. 24).

And then, after four paragraphs, not specifically material, occurred the other clause which was construed and which for convenience will be referred to as Clause B.

("Clause B.")

> It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United

States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same (fol. 26).

Revised Statutes, section 3709, referred to at the end of "Clause A" above, reads as follows:

SEC. 3709. *All purchases and contracts for supplies or services, in any of the departments of the Government,* except for personal services, *shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract,* at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. And the advertisement for such proposals shall be made by all the executive departments, including the Department of Labor, the United States Fish Commission, the Interstate Commerce Commission, the Smithsonian Institution, the Government Printing Office, the government of the District of Columbia, and the superintendent of the State, War, and Navy building, except for

paper and materials for use of the Government Printing Office, and materials used in the work of the Bureau of Engraving and Printing, which shall continue to be advertised for and purchased as now provided by law, on the same days and shall each designate two o'clock post meridian of such days for the opening of all such proposals in each department and other government establishment in the city of Washington; and the Secretary of the Treasury shall designate the day or days in each year for the opening of such proposals and give due notice thereof to the other departments and government establishments. Such proposals shall be opened in the usual way and schedules thereof duly prepared, and, together with the statement of the proposed action of each department and government establishment thereon, shall be submitted to a board, consisting of one of the Assistant Secretaries of the Treasury and Interior Departments and one of the Assistant Postmasters-General, who shall be designated by the heads of said departments and the Postmaster-General, respectively, at a meeting to be called by the official of the Treasury Department, who shall be chairman thereof, and said board shall carefully examine and compare all the proposals so submitted and recommend the acceptance or rejection of any or all of said proposals. And if any or all of such proposals shall be rejected, advertisements for proposals shall again be invited and proceeded with in the same manner.

THE BREAKDOWN OF THE CONTRACTORS AND THE "ANNULMENT" OF THE CONTRACT.

The total estimated amount to be dredged was 2,037,491 cubic yards (fol. 23), which was to be done in forty months (fol. 24), requiring, if steadily prosecuted, a monthly average of 50,937 cubic yards.

During the first eleven months of the work—that is to say, from its beginning on March 1, 1899, up to February 1, 1900—while the work of the contractors was not wholly satisfactory or promising, they nevertheless managed to make an average of 41,808 cubic yards (fol. 63).

Most of this work was done with one dredge, but now and then the contractors put on a second one, so that the total dredge time for the eleven months was equivalent to thirteen months eighteen days for one dredge (fol. 63).

At the end of the year 1899, after this eleven months, the work collapsed, and substantially nothing more was done.

In December the second dredge was taken off and removed from the locality (fol. 63), and it never thereafter appeared.

In January the contractors, wishing to take the remaining dredge off the work for a month or so on account of the rough weather to be anticipated, asked and obtained permission to do so, stating that they would spend the time advantageously in repairs, which would enable them to start in good shape in the early spring (fol. 63).

In February and March and the first half of April, 1900, no work was done.

On April 16 the dredge returned without repairs, excepting a new cutter for the dipper and a few new tubes for the boiler (fol. 64), and on April 18 it resumed work, and dredged during the rest of the month 11,512 cubic yards (fol. 64).

In May, 1900, sixteen days were lost by breakdowns, and only 13,825 cubic yards were dredged (fol. 64).

In June twelve days were lost by breakdowns, the dredge being removed on the 16th with both boom sheaves broken and hoisting friction out of order (fols. 64–66). Prior to June 19, the contractors advised Major Lockwood (who was then the engineer in charge) that they would put a second dredge on the work before that date (fol. 64), but they did not do so, and Major Lockwood wrote to them, pointing out that only trifling repairs had been made on the existing dredge, that there had been very little work done and a great many breakdowns, and proceeding as follows:

> It must be apparent to you that to carry out the spirit of your contract more dredging must be done monthly than has been done of late, and I have to say that unless I see evidence of an intention on your part to increase your monthly output I shall call the attention of the Chief of Engineers to the matter, with a view to having the work done in some way within the time specified in the contract. I have been led to believe that an extra dredge

would be put on before this, but there are no indications, as far as I know, of any such action being taken on your part. The matter is becoming so serious that I must ask you to give it your immediate attention. It seems to me advisable that you should increase your monthly output to 100,000 cubic yards, in order to carry out the spirit of your contract (fols. 64, 65).

On the 25th the single dredge was put back, but for only five days, being withdrawn again on the 30th, owing to a breakdown in the main engine requiring removal of the machine to Providence (fol. 65). During this month only 15,617 cubic yards were dredged (fol. 66).

In July the dredge was disabled the whole month (fol. 66) and no work was done, though on July 2 Perkins had called upon Major Lockwood and stated that the work would be resumed at an early date and that he was making arrangements for an additional dredge (fol. 97), and on July 13 the contractors had further promised that they would hasten repairs on the dredge then at Providence and would make arrangements for a clamshell machine to go on the upper reach (fol. 97).

Throughout August it was still disabled and no work was done (fol. 66), although on the 6th of August Perkins had stated work would be begun by the 20th (fol. 65).

In the beginning of September representatives of the contractors waited upon the engineers and reported that their plant was ready to go on and

that the dredge would go down to the work on Tuesday or Wednesday, the 4th or 5th (fols. 97 and 65). Nothing further was heard, however, and on the 13th, work not having been resumed, and the inspection having reported that nothing had been done toward driving the dolphin, and that the dredge was still at Providence (fol. 98), Major Goethals (who had taken charge of the work) wrote to the contractors and to the surety, stating the facts as above outlined, and announcing his conclusion as follows:

> The contract further stipulated that should the contractors fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then the party of the first part, or his successor legally appointed, should have the power, with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to that effect to the parties of the second part.
>
> In connection with the above, I would state that, in my opinion, the work has not been faithfully prosecuted (fol. 97). * * *
>
> As the dredging plant has been ready for work for the past two weeks and is still at Providence, I have to inform you that unless work is resumed immediately I shall recommend to the Chief of Engineers the annulment of the contract (fol. 98).

On September 25 the dredge was replaced on the work, but on account of trouble with the backing friction could not actually begin until the 27th, on which day and the 28th work was done. On the 29th

they broke a tooth in the gear wheel and that ended the work for September (fol. 65). In the two days' work done this month there was dredged 2,854 cubic yards (fol. 66).

On October 1 work was resumed and continued until the 11th with two days' and two hours' lost time, but on the 11th a tug came along and took off (it was said to New York) the two scows and thereby the dredge was made useless (fols. 65, 75). In this month 9,447 cubic yards were dredged (fol. 66).

Thereupon, Colonel Goethals, in his letter of October 15, wrote a full account of the situation to General Wilson, the Chief of Engineers, and recommended the annulment of the contract on the ground that—

> the contractors are not able satisfactorily to do the work (fol. 62).

The division engineer approved this recommendation in an indorsement, in which he stated:

> The contractors show themselves either unwilling or unable to do the work (fol. 67).

And the Chief of Engineers thereupon, in the third indorsement, authorized Major Goethals to annul—

> in case there is no change in this case and the contractors show no intention to proceed with the work (fol. 67).

In November, while this letter was going through the department at Washington, the United States Marshal seized the dredge and the tug on process for some debt and announced them for sale on the 17th (fol. 74–75), which, in connection with the removal of the two scows and the rest of the progress of the

contractors, led Major Goethals to the conclusion that—

> either they were not financially able to continue the work satisfactorily, or, if they had the means, they did not care to use it in that way (fol. 75).

Soon thereafter the letter of October 15 came back to Major Goethals with the indorsements above indicated, to which Major Goethals added the following:

[Fourth indorsement.]

U. S. ENGINEER OFFICE,
Newport, R. I., November 26, 1900.

Respectfully returned to the Chief of Engineers. This paper was received just after receipt of a telegram from the contractors that they would have their plant, consisting of one dredge, one scow, and a tug, on the work on Thursday, the 22d instant, so that as the conditions had changed and the contractors had showed an intention to proceed with the work, the contract could not be annulled under the second indorsement hereon.

The contractors secured the release of their plant by giving bond for their indebtedness, and on the 20th instant Mr. Perkins informed me that they were arranging with the International Dredging Company and with Mr. Packard for additional dredges to put on the work. The representative of the International Dredging Company, however, informed me that his company would put some of their plant on the work if the surety company on

the bond would guarantee payment; Mr. Packard would also assist if he could be assured of his pay. Work was resumed on Thursday, but because of the very leaky condition of the scow operations had to be suspended, and the dredge was towed to Greenwich Harbor and the scow beached at Warwick Neck. The present dredging plant is not sufficient to properly prosecute the work, and I have the honor to recommend that I may be authorized to notify the contractors that, unless the plant be increased sufficiently to remove monthly the amount to complete the work under the terms of the contract, that with the approval of the Chief of Engineers, the contract will be annulled on January 1, 1900 [1901]. This will give them at least a month to secure additional plant and to show some determined effort to do the work in full accord with their contract.

GEO. W. GOETHALS,
Major, Corps of Engineers (fol. 69).

On December 3 the sixth indorsement was added, as follows:

[Sixth indorsement.]

OFFICE CHIEF OF ENGINEERS,
U. S. Army, December 3, 1900.

Respectfully returned to Major Goethals, who is authorized to proceed as recommended in the fourth indorsement hereon.

To be returned.

By command of Brigadier-General Wilson.

JAS. L. LUSK,
Major, Corps of Engineers.

Accordingly, on December 4, Major Goethals wrote the contractors and the surety that in order to finish the work on time it would be necessary to remove about 100,000 cubic yards per month, which would require at least three dredges continuously; and he gave them notice that unless they had on the work by January 1 a plant sufficient to do at least that amount per month the contract would be annulled (fol. 56).

On December 13, 1900, O'Brien replied to this letter, as follows (fol. 57):

JOHN O'BRIEN, CONTRACTOR,
No. 253 BROADWAY,
New York, December 13, 1900.

GEO. W. GOETHALS, Esq.,
Major, Corps of Engineers, U. S. A.,
Newport, R. I.

DEAR SIR: Your favor of December 4 is at hand. In reply, I desire to say that we are about to make a deal with Mr. Kirk, which I think will be fixed up by Monday, whereby he is going to put on two more dredges, and which I think will be satisfactory to you. It may be that he can not get ground within a few days, but it won't vary but a very short time. Mr. Seward, who I had in charge of the work, has been discharged for some time, and I didn't know but what he may have been around your office. I hope you will not give him any information in regard to my business, as he is not a reliable man, and, furthermore, he has left matters in very poor shape. He has run me behind this summer over

$10,000. Will you please give me an estimate for last month, and oblige,

Respectfully, yours,

JOHN O'BRIEN.

Nothing came of the application to Mr. Kirk for help (fol. 107) or of the similar applications for outside help from the International Contracting Company, and from a Mr. Packard (fols. 74, 115, 116), both of whom interviewed Colonel Goethals and said that they would furnish Perkins and O'Brien the dredges, provided they could have assurance of getting their pay (fol. 74). Colonel Goethals told them that the Treasury Department regulations did not permit his acceptance of a power of attorney from Perkins and O'Brien to pay other persons for the work (fol. 116); and the contract was expressly made nontransferable (fol. 26).

The contractors lost four days in December in trying to get supplies in Providence, which would not be furnished unless paid for (fol. 107).

On the 29th one of the scows was condemned, as it could not hold any of the material put into it (fol. 107); and on that same day the first communication from the contractors since their letter of December 13 was received, being a telegram from O'Brien as follows:

> My representative will call on you Tuesday morning (fol. 58, 59).

The Tuesday referred to was the 1st day of January (fol. 59), and dredges being what was required

This failure was all the more conspicuous because it appeared that the contractors had selected only the easy portions of the work. There were three reaches to be dredged; the first was of soft material, the second of hard material, and the third of soft material again. After dredging the first reach of soft material Perkins & O'Brien skipped the middle reach of hard material, and spent the rest of their time on the other soft reach; so that all the hard portion of the work was left untouched (fols. 95–96).

The defendants expressly disclaimed any suggestion that Major Goethals acted fraudulently (fol. 73), but in their motion to dismiss, they advanced the claim that he was "unreasonable" (fol. 122).

THE DAMAGES.

After the breach and "annulment" of the contract, Major Goethals readvertised the work and relet the contract (fol. 77), and the Government was obliged to pay the new contractors $76,470.07 more than it would have had to pay Perkins & O'Brien for the same work (fol. 76).

Upon this gross amount of damage or excess cost the Government credited, as against the defendant O'Brien, the retained percentages and amounts due, aggregating $8,300.40, leaving a net demand of $68,169.67 (fol. 53).

As against the defendant surety, the Government credited the sum of $2,707.55, an amount paid by the surety to a subcontractor, thereby reducing the demand against it from $30,000, the amount of the bond, to $27,292.45 (fols. 37–54).

ARGUMENT.

The line of argument is summarized by the Index, at the beginning of this brief.

FIRST.

THE "ANNULMENT" OF THE CONTRACT BY MAJOR GOETHALS WAS VALID. IT WAS MADE IN GOOD FAITH; IT WAS NOT PREMATURE; AND IT WAS DULY SANCTIONED BY THE CHIEF OF ENGINEERS.

A.

It is nowhere suggested in the record that the engineer, in annulling the contract, acted maliciously or fraudulently, or otherwise than in accordance with his own real judgment; and on the trial any such suggestion was expressly disclaimed (fol. 73).

It was contended, however, that he acted "unreasonably" (fol. 122), because, it was said, even at the time of the annulment there remained still sufficient time for due completion of the work. Indeed, the successor contractors did finish it before the date originally limited, but it was perfectly plain that Perkins & O'Brien could not have done so, for they did not have and could not command the necessary plant (fol. 105), and the contract was not transferable (fol. 26).

The Circuit Court of Appeals were unanimously against this contention, and they pointed out that "there was no evidence introduced or offered tending to show that, in exercising his judgment as he did, the engineer officer did not act with fairness and good faith" (fol. 146).

By the contract the "judgment" of the engineer in charge was made the test of the right to annul (fol. 24). Where, then, he acted upon his "judgment," and not upon any malicious or fraudulent motive, his decision is final, as this and other courts have repeatedly held.

Kihlberg v. *United States* (97 U. S., 398):

> The action of the chief, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part (p. 401). * * * In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the Government (p. 402).

United States v. *Gleason* (175 U. S., 588, *supra*).

Martinsburg, &c., Co. v. *March* (114 U. S., 549, 553).

Sweeny v. *U. S.* (109 U. S., 618, *supra*).

Newman v. *U. S.* (81 F. R., 122, 126).

Pauly, &c., Co. v. *Hemphill County* (62 F. R., 698, 704).

Crane Elevator Co. v. *Clark* (80 F. R., 705, 708).

Kennedy v. *U. S.* (24 Ct. Cls., 122, 141, *supra*).

Pearce v. *McIntyre* (29 Mo., 423).

Davenport v. *Fulkerson* (70 Mo., 417).

Allen v. *Milner* (2 Car. and J., 47).

Whitehead v. *Tattersall* (1 Ad. and El., 491).

B.

The claim that the final annulment was made one day too soon was not well founded.

The argument of the defendants on this point is as follows:

In his letter of December 4, 1900, Major Goethals notified the contractors and their surety that the contract would be finally annulled unless by January 1, 1901, they should have on the work a sufficient plant to dredge at least 100,000 cubic yards per month (fol. 96).

The first letter of formal annulment was dated and mailed December 31, 1900 (fols. 60, 73).

From this fact it is argued that the annulment was one day too early and therefore invalid.

The Circuit Court of Appeals below held the contrary, distinguishing *King* v. *U. S.* (37 Ct. Cls., 428), on which the point had been based, on two grounds: (1) That here it was the fact that the notice could not have been received until the specified January 1 (fol. 73), and (2) that the required condition was not in fact fulfilled even by January 1, no plant sufficient to meet the requirements being put or sought to be put on the work by that time. It appeared beyond question that the contractors would not have had the required plant on hand by January 1 or, indeed, at all. At no time after the letter of December 4 was there the slightest sign of any increase in the equipment or scale of work (fol. 61); and Mr. O'Brien removed the last possible hope by his telegram of December 29

(fol. 59), in which he announced, not that the equipment was on its way or would arrive, but that his "representative" would arrive and "call at the office on the next Tuesday," which was the first day of January.

At any rate, the contractors regarded the annulment as not invalid, for forthwith they finally stopped work (fol. 109), and they never claimed any right to continue it. The objection, even if otherwise well founded, can not survive this recognition. (*Kennedy* v. *U. S.*, 24 Ct. Cls., 122, 138.)

Furthermore, there is no principle of law which would preclude the engineer from terminating the contract at any time, notwithstanding his letter of December 4, 1900, if further experience convinced him that the contract required such annulment; at least where the contractors had not in the meantime changed their position.

C.

The annulment was duly sanctioned by the Chief of Engineers.

The contract did not require any written sanction by the Chief of Engineers (fol. 24).

His sanction in fact was proved beyond dispute (fols. 34, 56, 67).

But even the written sanction was proved:

(1) By the official paper signed "By command of Brig. Gen. Wilson, Jas. L. Lush, Major, Corps of Engineers" (fols. 67, 70, 75–6), such signature by authority being sufficient, as was held in *Wilcox* v.

Jackson (13 Peters, pp. 498, 513; *Jones* v. *U. S.* (137 U. S., 202, p. 217), and in *Miller* v. *Mayor of New York* (109 U. S., 385, p. 394), in which latter case the court stated the rule as follows:

> It is also objected that the notice given by the chief engineer to the company was not a compliance with the requirement that notification should be given by the secretary; but there is no force in the objection. When a secretary of the Government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication *is deemed made by him when it is made under his sanction and direction.*

(2) By the official paper (fol. 68), which General Wilson actually himself signed by his own personal hand (fol. 118).

These official papers were unquestionably competent evidence of the fact.

U. S. v. *McCoy* (193 U. S., 593, 602).
U. S. v. *Corwin* (129 U. S., 381).
Oakes v. *U. S.* (174 U. S., 778).
The Earldom of Perth (2 H. L. C., 865).
Daly v. *Webster* (1 U. S. App., 573, 610).
Sandy White v. *U. S.* (164 U. S., 100, 103).
Conn. Ins. Co. v. *Hillman* (145 U. S., 285, 295).

And even if they had not been, the proof can not now be attacked, for no objections were made to their admission.

White v. *Wansey* (116 F. R., 345–7).

George Adams Co. v. *South Omaha Bank* (123 F. R., 641).

Board v. *Thompson* (122 F. R., 860, 863).

SECOND.

THE SO-CALLED "ANNULMENT" REFERRED TO IN THE CONTRACT DOES NOT MEAN A RESCISSION AB INITIO, BUT IS MERELY INTENDED TO EFFECTUATE THE TERMINATION OF THE WORK UNDER THE CONTRACT ON A BREACH. THE USE OF THIS WORD WAS NOT INTENDED TO RENOUNCE THE RIGHT OF THE GOVERNMENT TO DAMAGES.

It was seriously urged by counsel below that the "annulment" of the contract by the engineer in charge completely abolished all rights of either party under it; that it was in effect a rescission *ab initio*, intended to leave the parties just where they stood.

The court below did not accept this view (fols. 144–5), and the Circuit Court of Appeals for the Fifth Circuit, the Court of Appeals of the District of Columbia, and the Court of Claims have all decided against it.

U. S. v. *Maloney* (4 Appeal Cases, D. C.).

U. S. v. *Stone, Sand and Gravel Co.* (177 Fed., 321).

Kennedy v. *U. S.* (24 Ct. Cls., 123).

Not only these cases dealing with this specific form of contract, but numerous other cases have pointed out the difference between the technical "rescission" of a contract in the artistic meaning of that word,

and such action, loosely called "annulment," "termination," "cancellation," "abrogation," "abandonment," or "ending" of a contract, as is intended merely to be the stopping of performance thereon by a party as preliminary to proceeding for a breach by the other party.

The essential vice of the contention made before the court below was its failure to recognize a fundamental principle of the law of contracts, viz, that so long as an aggrieved party under a contract continues work under it he can have no right for damages as for a total breach. When, however, the breach occurs and the aggrieved party takes his stand upon it and abandons performance, then, and then only, does the law grant him a right to damages. This principle was established by this court in *Anvil Mining Co.* v. *Humble* (153 U. S. 540), in which it was claimed that the plaintiff could not recover for a breach of contract because he had "rescinded" it. To this contention the court said (pp. 551–2):

> Whenever one party thereto is guilty of such a breach as is here attributed to the defendant the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

Of course this principle is universally recognized:

McElwee v. *Bridgeport Co.* (54 Fed. Rep., 627, C. C. A. 5th C.).

Vickers v. *Electrozone Co.* (67 N. J. L., 665, 671).

Cort v. *Ambergate Railway Co.* (17 Q. B., 127, 148).

Berthold v. *St. Louis Co.* (165 Mo., 280, 304, 305).

Baldwin v. *Marqueeze* (91 Ga., 404).

Wiel v. *American Metal Co.* (182 Ill., 128).

Williston's Wald's Pollock on Contracts, 350, 351.

And in *Daley* v. *People's Building Association* (178 Mass., 13, 18), Mr. Justice Holmes commented on and applied this distinction between "rescission" and the right to stop performance on a breach.

Specifically, there are numerous decisions in addition to the *Maloney* and *Stone, Sand and Gravel Company* cases, *supra*, in which such words as the word "annul" have been held not to be equivalent to the word "rescind" in its artistic sense.

In *Philadelphia, etc., Co.* v. *Howard* (13 How., 307) this court construed a contract which authorized a railroad company to declare the contract forfeited, "and thereupon the same shall become null." The railroad company having annulled the contract under this clause claimed that thereby they had deprived the other party of an action for moneys held in arrears. The court held that the "annulment" did not have this effect, but left the preexisting rights in *statu quo*, even where not specifically saved.

In *Hayes* v. *City of Nashville* (80 Fed. Rep., 641), the Circuit Court of Appeals for the Sixth Circuit applied the principle thus laid down by this court to a contract containing a clause almost identical to that here under construction. This clause was as follows:

> If the said W. J. Hayes & Sons fail to take and pay for any installment of bonds as above provided when delivered, then, at the option of the said city of Nashville, this contract may be declared *null and void* in all its provisions.

Hayes & Sons having failed to take certain installments of the bonds, the city proceeded by formal resolution under this clause of the contract to declare the contract "null and void and of no further effect." The plaintiff claimed, precisely as the defendants claim in this case, that the city could have no right for damages after such an annulment, because an "annulment" amounted to a "rescission." The court, however, held the contrary, and sustained the claim for damages upon the annullment. Judge Taft wrote the opinion, of which the essential portions are as follows:

> It was first contended on behalf of the plaintiffs in error that the city could not claim damages for breach of the contract, by way of set-off, because its action in annulling the contract was a complete rescission of it, releasing each party from every obligation under it, as if there never had been a contract made. It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was be-

> fore the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment. * * * In this case the original contract provided for an *annulment* of the contract. * * * We can not suppose that the city in making this contract intended to reserve to itself only the right completely to destroy the contract, and thus to obligate itself to give up to the defaulting party the indemnity it had been careful to secure against loss; and yet such must be the construction of the contract, *if the annulment provided therein means a complete rescission.* * * * The declared intention of the city to retain its deposit can only be reconciled and made consistent with its declaration of annulment by construing the latter to be merely *an abandonment of the contract, and not a* complete rescission.

The same court in *Cherry Valley Iron Works* v. *Florence Iron Works* (64 Fed. Rep., 569, 573) upheld an action for damages for breach of contract, although the contract had been "*canceled*" under a provision that the party should "have the right to *cancel* this contract for all ore not delivered before such default is made." It was there contended on behalf of the defendant that the "cancellation" was a com-

plete "rescission" and that no damages could be recovered. Other cases to the same effect are:

Hubbartston Co. v. *Bates* (31 Mich., 158):

> In which the court held that even an announcement of a "rescission" by use of that very word did not result in a technical legal rescission where it was coupled with a statement that the rescinding party would look to the other for damages.

Mayor, etc. v. *New York, etc., Company* (146 N. Y., 210).

> In which the comptroller of the city of New York notified the defendant that its contract was "canceled and annulled" and thereupon sued for rent under the contract up to the time of such cancellation and annulment. It was held that the cancellation was not a rescission, but was simply a termination of performance.

Hinsdale v. *White* (6 Hill, 507).

McKeon v. *Whitney* (3 Denio, 452, 453).

Vickers v. *Electrozone Co.*, 38 Vroom, 665.

Marshal v. *Mackintosh* (Q. B. D., 1898; 46 W. R., 580; 78 Law Times Reports, p. 750),

> in which Kennedy, J., allowed damages for breach of a contract, although the party suing proceeded under clauses in the contract, which read as follows: "On default by the lessee of the stipulation contained in this clause (i. e., to complete within the time allowed), he shall forfeit all benefit under this agreement which shall thereupon cease and be determined, and all the materials and buildings on the said premises shall be forfeited to and become the absolute property of the lessor."

I. Numerous clauses and terms of the contract show that the work was intended to be prosecuted diligently from the date set for its beginning to its final completion.

The covenant is substantially expressed by the very terms of "Clause A" itself (fol. 24)—that if the contractors should, "in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract," then the engineer should have the power to annul, and so on. The words "fail," "prosecute," "faithfully," and "diligently" all presuppose a current, steady operation, and especially the words "fail," "faithfully and diligently," presuppose a duty upon the contractor. It is not the natural use of language to speak of a contractor's "faithful" prosecution of his work if he was under no duty. The *Standard Dictionary* defines "faithful" as "true or trustworthy in the performance of duty, especially in the fulfillment of promises, obligations, vows, and the like; as, a faithful wife or servant; faithful to one's agreement." The *Century* defines it as "observant of compacts, treaties, contracts, vows, or other engagements;" *Webster* as "firm in adherence to promises, oaths, contracts, treaties, or other engagements," and *Worcester* as "firmly adhering to profession, promises, duty, or truth."

The contract itself defines the failure to prosecute faithfully and diligently to be not in accordance with

the "specifications and requirements of this contract." The purport of the language in this clause is that, of course, the failure to prosecute faithfully and diligently for which a remedy is expressly provided is understood to be a breach of duty on the part of the contractors. It was not intended that the engineers should have power to annul for a failure of the contractors to do what they were not intended to do.

At folio 19 the contract provides:

> *Actual work of dredging must be commenced by the contractor on or before March 1, 1899*, and be completed by July 1, 1902. *Should operations be suspended awaiting appropriations*, the time allowed for completion of contract may be correspondingly extended, and the operation of paragraph 35 of these specifications will be suspended for a similar period.

The only reasonable interpretation of this clause is that operations were to progress from the time at which the work was required to be begun to its completion. Reference to suspension of operations strongly indicates this; but especially persuasive is the provision that the actual work of dredging must be commenced by the contractor on or before March 1, 1899. Of what possible interest could such a provision be to the parties if it was intended that the contractor, after having so begun his work on the

first day of March, could suspend it entirely on the second day of March and not resume for, say, two years?

Again, at folio 19 the contract similarly provides:

> In case of cessation or suspension of work while awaiting appropriations by Congress, the contractor *shall resume work within thirty days* after notification that funds are made available for payments for work under the contract.

Is it possible that here also the parties intended that the contractor, though obliged by covenant to resume work within thirty days after such notification, could on the thirty-first day freely abandon it for an indefinite period?

At folio 16 the contract provides:

> *Payments will be made monthly*, when funds are available, ten (10) per cent being reserved until the total amount thus retained is equal to ten (10) per cent of the cost of completing the remainder of the contract as estimated by the engineer officer in charge. When this amount has been retained, no further reservations shall be made from the monthly payments; and the *last monthly payment of each fiscal year* (except for year ending June 30, 1899) such portion of the total amount retained as will then reduce it to ten (10) per cent of the cost of completing

> the then remainder of the contract, as estimated by the engineer officer in charge, shall be paid to the contractor. *Should payments be discontinued for a period of one year owing to lack of funds*, the total amount reserved from previous payments shall be paid to the contractor, it being understood that such payments will in no respect release the contractor from his obligators (*sic*) under this contract, but that the contract and accompanying bond are to remain in full force and virtue the same as if such reserved per centum had not been paid.

The whole spirit of this paragraph contemplates a continued application by the contractors to the work, with a regular sequence of monthly payments by the Government apportioned to the current monthly work. The reference to the "last monthly payment of each fiscal year (except for year ending June 30, 1899)" is especially persuasive of an intention that work is to be done in each fiscal year.

At folio 26 it is provided that the monthly payments shall be "*based upon amount of material removed,*" a clause which plainly implies that it is expected that material shall be removed each month.

An officer of the United States engineers was to be in charge of the work (fols. 18, 19, 20, 23, 24). All the material furnished and all the work done was to be subject to his inspection (fol. 23), and he was to be the judge of the fidelity and diligence of the pros-

ecution of the work (fol. 24). There were to be inspectors under this engineer in charge, whose duty it was to measure each scow as it was loaded (fol. 19), to mark in advance the location of the work, and to set the tide gauges (fol. 20). The contractors were bound to furnish the inspector with suitable boats (fol. 20) and with assistance for his soundings or other work (fol. 20), and with board and lodging, which latter expense was to be reimbursed by the United States (fol. 20).

These stipulations requiring steady detail of government officers and continuous supervision by them implied a continuously prosecuted work.

II. The obvious policy of this government work is inconsistent with the idea that the contractors were to have the right to refrain entirely from the work for, say, the first three years of the term (after the first day), in the hope of being able to complete it on time by using a gigantic plant in the last six months. Time is too clearly of the essence, and the public has too much at stake in these great works to make it reasonable to suppose that the Government intended to take such a risk. The whole spirit of the contract is that the work should be so done under the supervision of the government officers as to make them reasonably sure that it would be finished on time, and it is unthinkable that the parties did not intend that the contractors should be under a corresponding obligation.

In *U. S.* v. *Stone, Sand & Gravel Co.* (177 F. R., 321, *supra*) the Circuit Court of Appeals for the Fifth Circuit, in holding that the Government was entitled to damages after annulment under this precise form of contract, where the contractors had failed to begin the work at the time specified, discussed the policy and general intention of the annulment clause, as follows:

> The contract was duly annulled for failure to commence active operations under it within the time specified. Some preliminary experimental work had been done to the value, at the contract prices, of $6,206.69, which the defendants claim became forfeited to the plaintiff and extinguished all liability on the part of the defendants. This effort to split the contract into sections of liability and wrest the meaning of the words "annul" and "forfeiture" from the signification which the whole dealings of the parties show should be given to them, does violence to the plain intent of the parties. *The work was important in its magnitude and in the benefit it promised; it was of public interest that it should be done within a reasonable time, and be of efficient and lasting quality. It was in contemplation of the parties that the contractor might be unable to perform the work in the manner and in the time specified; and to prevent its being obstructed and delayed by the inability of the contractor to proceed, arising out of causes within the control of an efficient contractor, provision for clearing the way of the Government to do this work by such other means as it might be able to employ was made;* and the word "annul," used in

> reference to that situation, should not be given a technical or narrow meaning, or be allowed to embarrass the administration of justice in dealing with conditions which call for only the application of the plainest common sense (p. 326).

The theory of these provisions is further illustrated by the language in which it was expressed in the contract construed in *Jackson* v. *Cleveland* (19 Wis., 400, *supra*), in which damages were held recoverable after annulment under a clause providing that—

> in case it should appear to the engineer that the work is not progressing *with sufficient rapidity to secure its completion within the specified time*, said party of the second part (Cleveland) may employ additional help to hasten its completion, and the expense of such help shall be paid by said party of the first part to said party of the second part, or said engineer may, in such case, determine that the contract has been abandoned by the party of the first part, in which event this agreement on the part of said party of the second part shall be null and void, and he shall have full right to contract with any other person for the completion of the work.

In its discussion of the construction of this clause the court said:

> Such provisions are common in this class of contracts, and are obviously inserted to secure the prompt completion of the work in a case where perhaps such completion might be of the greatest possible importance (p. 409).

Also the clause construed in *Landgon* v. *Northfield* (42 Minn., 464) expressly stated this underlying reason for these provisions as follows:

> If the second party shall at any time neglect or refuse to proceed with the work as fast as, in the opinion of said chief engineer or the first party (communicated in writing to the second party), *may be necessary for the completion by the time specified therein.*

These considerations of policy were plainly the occasion for the requirement in the contract that the work should be begun on or before a certain specified day, and whenever interrupted by failure of appropriations should be promptly resumed within thirty days; yet, as has been pointed out, this underlying purpose and object of these particular provisions would totally fail if the construction adopted by the majority of the court below should be affirmed. It is not conceivable that the parties should have made these particular provisions for this obvious particular purpose if that purpose was still to be destroyed by stoppage of the work the day after its begining.

No reasonable ground has been suggested for supposing that the Government was to be limited, in case work was practically abandoned on the second day of the contract, to an election between giving up its actual damages and waiting three years until the final day should have passed. Such a situation would leave the Government helpless as against a contumacious or negligent or insolvent contractor,

and would deprive it of any practical benefit from the summary process provided for annulment. The effect upon public work of such a provision would be most unfortunate.

Light is thrown on the situation from this point of view by the testimony of Major Goethals, as follows:

> The work was being done in a stretch of the river and in a stretch of the bay where there was considerable commerce. There were a great many complaints made by commercial interests that the dolphins were not kept lighted, and they were an obstruction to navigation, and both the scows and dredge were obstructions, especially during foggy seasons. Dolphins are clumps of piles driven to form a line to guide the dredge in its work. I came to the conclusion it was better to have the contract annulled and get the work done in some other way than to allow it to drift along for eighteen months and then have to resort to another contract (fol. 75).

One obvious consideration in fixing the length of time to be allowed for such contracts is the question how considerable a plant can be used without undue obstruction to navigation in the surrounding waters. This contract provided, for instance, that care should be taken to interfere with regular navigation as little as possible (fol. 20). The degree of such interference, of course, depends, among other things, upon the extent of plant; and what might be accomplished in six months, if a river were closed, might take a year when done side by side with navigation.

The policy of congressional appropriations also indicates that the work was intended to be kept going concurrently with the appropriations. Major Goethals explained this as follows in his testimony:

> In the letter of October 15, 1900, this language is used: "The funds available now are sufficient to dredge upward of one million cubic yards, which would require dredging 100,000 cubic yards per month from now until next March, when further appropriations may be expected." That is an extract from Colonel Lockwood's letter, which I quoted in my letter to the Chief of Engineers. The term funds available means this. This was a continuing contract on big work such as this for which they appropriate a certain specified sum to be expended, with authority to enter into contract for another amount—a larger amount—which will be provided for by subsequent appropriation, and subsequent appropriations are made in the sundry civil bill. I presume Major Lockwood had reference to that—that another appropriation had been made. The contract provided that in case of failure of Congress to provide the necessary funds certain steps should be taken, etc. It was because these funds were then available that this estimate of 100,000 cubic yards was made (fol. 114).

The contract itself assumes this interrelation of appropriations and work by providing for the contingency of the suspension of work awaiting appropriations and by requiring the resumption of work within thirty days after notification that funds had become available (fol. 19).

III. The "annulment" of the contract and the "forfeiture" of the reserved percentages were plainly intended to be remedial, and therefore they plainly implied a breach of contract; for the existence of a legal remedy presupposes a correlative right. It is an infliction upon the contractors, and as such it reasonably implies some breach of covenant upon their part. To hold otherwise, as was done by the court below, is to find damages (whether we call them liquidated or not is immaterial) where there was no legal injury—a result which is anomalous under our law of contracts.

In fact the annulment clause was not intended to operate otherwise than upon a breach, for the engineer is authorized to annul only in case, in his judgment, the contractors fail to prosecute faithfully and diligently the work "in accordance with the specifications and requirements of the contract." Annulment, then, is provided not, as assumed by the court below, for a mere failure to satisfy the uncontrolled ideas of the engineer, but only for a failure, in the the engineer's judgment, *to satisfy the contract*, and failure in fidelity and diligence is described as failure to meet the "specifications and requirements of the contract."

The purpose of giving to the engineer in charge this power of annulment is plainly to provide a conclusive and summary means of ascertaining a breach and of terminating the contract thereon. The engineer is merely made the arbiter of the fact of a breach. The clause would never have appeared in

the contract at all but for the practical necessity for some such procedure.

In other words, the subject of the clause was not the consequences of the breach, but the method of ascertaining it.

Such provisions for establishing breaches by finding of a government officer are almost invariably present in contracts for government work, examples of such contracts occurring, for instance, in the following cases:

U. S. v. *Gleason* (175 U. S., 588).
Sweeney v. *U. S.* (109 U. S., 618).
Kihlberg v. *U. S.* (97 U. S., 398).

The general objects of all such provisions referring the final decision of questions of breach to an engineer or architect as a sort of umpire are sufficiently obvious. They were stated by this court as follows in the *Kihlberg case, supra:*

> If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the Government, resulting in vexatious and expensive and, to the contractor, oftentimes, ruinous litigation. Hence the provision we have been considering.

Especially is this necessary in the case of government contracts, generally involving work of high public importance. In such contracts summary termination of defective or dilatory work is

> unless the plant be increased sufficiently to remove monthly the amount to complete the work *under the terms of the contract*, that with the approval of the Chief of Engineers the contract will be annulled on January 1, 1901. This will give them at least a month to secure additional plant, and to show some determined effort to do the work *in full accord with their contract* (fol. 69).

On December 13, 1900, Mr. O'Brien, one of the contractors, wrote that he was expecting to complete a deal by which he hoped to put two more dredges on the work in a very short time (fol. 57).

On January 11, 1901, immediately after the annulment of the contract, Secretary Root wrote to Mr. O'Brien "the contract had been annulled for failure of the contractors to faithfully and diligently prosecute the work as required by the terms of the agreement" (fol. 105).

V. The court below stated that the contract was in a form prepared by the Government and that therefore any ambiguities in its language were to be construed against the Government. That rule, it is submitted, can have no application here, because the question whether the construction of this clause is in favor of or against the Government would always depend entirely upon the questions whether there was any actual damage and whether such damage was larger or smaller than the retained percentages. It is a pure question of mathematics, which in any particular case might be either way.

B.

Also the finding by the engineer in charge that the contractors were not going to complete the contract, and had become unable to complete it, was a finding of a breach, and it was not necessary for him to wait an additional eighteen months until their authoritatively ascertained inability had occasioned excessive damage.

This contract was expressly made not transferable (fol. 26), and therefore its performance depended absolutely upon the ability of Perkins & O'Brien themselves, and especially on their ability to command the necessary equipment. Accordingly the case is distinguished from such cases as *Brassel* v. *Troxal*, 68 Ill. App., 131, and *Vandergrift* v. *Cowles Co.*, 161 N. Y., 435, where *transferable* contracts were held not to be broken by the insolvency of the original contractors.

It was here conclusively found as a fact that the contractors were not going to perform the contract and had become unable to perform it. By this finding the case is brought directly within the principle of the modern rule concerning anticipatory breach.

Major Goethals and his colleagues reached this judgment after the certainty that the work would not be completed had been thoroughly demonstrated by the collapse of the contractor's plant, their financial difficulties, their practical abandonment of the work at the end of the first eleven months, their failure to resume it during the second eleven months in spite of all the promises made upon the urgency of

the government officers, their failure to show some real intention and effort to proceed, and their fruitless efforts to get outside help and equipment and credit. The facts in detail as to these matters are marshaled in the statement.

The finding of this breach as one of the reasons on which the "annulment" of the contract was based appears from the following portions of the record:

In his letter of October 15, 1900, to General Wilson, Major Goethals said:

> SIR: I have the honor to recommend that the contract with Messrs. Perkins & O'Brien, for dredging about 2,036,491 cubic yards from the 25-foot channel from Providence River through the western passage of Narragansett Bay, be annulled, as the *contractors are not able to satisfactorily do the work*, as the following records of this office indicate (fol. 62).

Colonel Gillespie, the division engineer, said in his indorsement on this letter, after summarizing the progress of the work:

> The contractors show themselves to be either unwilling or unable to do the work (fol. 68).

General Wilson said in the second indorsement:

> In case there is no change in this case, and the contractors show no inclination to proceed with the work, Major Goethals is authorized to annul the contract (fol. 67).

In the fourth indorsement Major Goethals said, after stating the seizure of the contractors' plant and

its release on bond, and their efforts to get outside help, and the insufficiency of their plant:

> The present dredging plant is not sufficient to properly prosecute the work, and I have the honor to recommend that I may be authorized to notify the contractors that unless the plant be increased sufficiently to remove monthly the amount to complete the work under the terms of the contract, that with the approval of the Chief of Engineers the contract will be annulled on January 1, 1900. This will give them at least a month to secure additional plant and *to show some determined effort to do the work* in full accord with their contract (fols. 68–9).

Similarly, in his testimony, especially at fols. 74–75, Major Goethals reviewed the financial difficulties of the contractors, the collapse of their plant, their fruitless efforts to get outside help, and he stated:

> These various matters led me to the conclusion that either they were not financially able to continue the work satisfactorily, or, if they had the means, they did not care to use it in that way. * * * I came to the conclusion it was better to have the contract annulled and get the work done in some other way than to allow it to drift along for eighteen months and then have to resort to another contract. Consequently I wrote my letter of October 15 to the Chief of Engineers recommending annulment, and I was finally authorized to annul the contract on January

1, 1901, unless in the meantime the contractors showed their ability to do the work by putting on the work sufficient plant to accomplish it (fols. 74–75).

Again (at fol. 105) he testified:

> *My judgment was that these men could not control sufficient plant to complete what remained to be done under the contract in the remaining time.*

And (at fol. 112) he testified:

> I had every reason to believe that they were either financially unable to carry the work to a conclusion or that they were unwilling to advance the necessary money to do this.

Breach of contract in advance of the time set for performance may be found in various forms; it may be by verbal repudiation through announcement of nonintention to perform, as in the leading case of *Hochster* v. *Delatour* (2 El. and Bl., 678) and as in innumerable American cases, including—

> *Roehm* v. *Horst*, 178 U. S., 1.
>
> *U. S.* v. *Behan*, 110 U. S., 338.
>
> *Bank* v. *Hagner*, 1 Pet. 455, 467.
>
> *El Paso Cattle Co.* v. *Stafford*, 176 F. R., 41, 47 (C. C. A., 6th C.).
>
> *Weber* v. *Grand Lodge*, 169 F. R., 522, 533 C. C. A., 6th C.).
>
> *Michigan Yacht Co.* v. *Busch*, 143 F. R., 929 (C. C. A., 6th C.).
>
> *M'Bath* v. *Jones Cotton Co.*, 149 F. R., 383, 387 (C. C. A., 6th C.).
>
> (The opinions in these last four cases were written by Judge, now Mr. Justice, LURTON.)

Edward Hines Lumber Co. v. *Alley*, 73 F. R., 603 (C. C. A., 6th C.).

Bloch v. *Mayor*, 169 F. R., 516, 522 (C. C. A., 6th C.).

Marks v. *Van Eeghen*, 85 F. R., 853 (C. C. A., 1st C.).

Hancock v. *N. Y. Life Insurance Co.*, 11 Fed. Cas., 402.

Grau v. *McVicker*, 8 Biss., 1.

Ballou v. *Billings*, 136 Mass., 307–308.

(Mr. Justice HOLMES writing the opinion.)

Or upon the same principle the breach may be found in the inability of the party to perform.

Such inability is manifested in a great variety of ways, as, for example, in *Lovell* v. *Insurance Co.* (111 U. S., 264), where the contracting corporation had disabled itself by transferring its assets and obligations to another corporation, or in *Louisville Ry. Co.* v. *Pope* (80 F. R., 745), where the Circuit Court of Appeals for the Seventh Circuit held that a breach had occurred when the contracting company was disabled because of want of means; or in *Dougherty* v. *Central National Bank* (93 Pa. St., 227), where the financial inability of a bank had been indicated by its closing its doors; or in *Diem* v. *Koblitz* (49 Ohio St., 41), where the financial inability of a contractor had been indicated by the fact that his paper had gone to protest; or in *Pratt* v. *Freeman* (115 Wis., 648), where, as the court said, the contractor had become "hopelessly insolvent;" or in *Stanton* v. *N. Y. and E. R. R. Co.* (49 Conn., 272), where the contracting company had become disabled by permitting its charter

to be forfeited; or in *Village of Lockport* v. *Shields* (87 Ill. App., 150), where the village had become disabled by causing a tax assessment, levied to provide funds for the particular work, to be set aside.

In *Robertson* v. *Davenport* (27 Ala., 574), the inability was manifested very much as in the present case. The plaintiffs had contracted to deliver to the defendant a certain quantity of hams at so much per pound, and did deliver part of the order. The defendant then learning that the plaintiffs had no more hams to supply their contracts, and that they had wholly failed to continue supplying certain other merchants with whom they had similar contracts, and that the price had risen very considerably, refused to pay for the hams which had been delivered, and the plaintiffs brought the suit. The trial court was asked to charge the jury that if they believed that the plaintiffs "*had ceased to have the ability to comply with their contract*, and the defendant knew that fact, he might refuse to pay for the hams sued for and might recoup his damages." The refusal to charge this proposition was held error after argument in which defendant's counsel placed his case on the proposition that inability to perform shown by the evidence "was tantamount to a refusal," and brought the case within the established rule that an express refusal by the plaintiffs would have justified the defendant in his refusal to pay and in recouping his damages. The court did not discuss the point at length, but based its decision on citation of such cases

of verbal repudiation, assuming that no substantial distinction existed.

The Court of Errors and Appeals of New Jersey, in *Holt* v. *United, etc., Insurance and Trust Co.* (76 N. J. L., 585), though deciding that in the particular case before them the prospective inability was not in a material matter, and therefore was not a sufficient breach, still recognized the principle that in a case like the one at bar the prospective inability would be a material breach. The point and the view of the court are thus stated in the opinion:

> The next ground urged for reversal is that the trial judge ought to have charged the defendant's sixth request, which was to the effect that if the jury should find that by the terms of the contract the defendant was to loan the money upon completion of the building on or before September 1, 1906, and that (regardless of defendant's repudiation) the plaintiff could not have completed it by that time, and that the president of the defendant so thought when he rescinded, and that such rescission was justified, the verdict must be in favor of the defendant. * * * Supposing there was evidence favorable to the defendant upon both of these points, *Chapman's demonstrated inability to complete the building by the very day specified would not justify the other party in rescinding the agreement in advance unless completion on or before a certain date was in express terms made essential to the agreement*, or else was so vital a matter that a failure of performance by Chapman in this

regard would render performance of the agreement by the company a thing different in substance from what it had stipulated for, and not a matter to be compensated in damages. * * * *The time of completion was not of the essence* of the agreement unless made so by the parties themselves.

Where time is of the essence of an agreement, a breach in this regard will bar a recovery by the one in default, and will entitle the other to abandon the contract. But where performance upon a precise date is not vital and may be compensated in damages, mere delay, in the absence of fraud or the like, will not justify the other party in abandoning the contract. And, for the same reason, where it is made plain in advance that one party will not be able to perform upon the precise date stipulated (*time being not made essential*), the other party may not repudiate his obligation in advance (pp. 591–592).

In the same line are the numerous cases of anticipatory breach because of inability shown by bankruptcy:

Carr v. *Hamilton*, 129 U. S., 252.

Re Neff, 157 F. R., 57 (C. C. A. 6th C.).

(Judge, now Mr. Justice, Lurton writing the opinion.)

Re Swift, 112 F. R., 315 (C. C. A., 1st C.).

Re Pettingill Co., 137 F. R., 143, 147 (D. C.).

Ex Parte Pollard, 2 Lowell Dec., 411.

Re Inman Co., 171 F. R., 185 (D. C.).

Or by insolvency indicated by receivership or assignment for benefit of creditors, before the time of performance.

Lennox v. *Murphy* (171 Mass., 370, 373), in which Mr. Justice Holmes, writing the opinion, said: "For although it has been said that an agreement to sell is not discharged by insolvency, yet it is agreed that insolvency would put an end to the right to purchase on credit or without a tender of the price."

Pardee v. *Kanaday*, 100 N. Y., 121.

New York Phonograph Co. v. *Davega*, 127 App. Div. (N. Y.), 222.

Woolner v. *Hill*, 93 N. Y., 576.

Chemical National Bank v. *World's Columbian Exposition*, 170 Ill., 82.

Lancaster County National Bank v. *Huver*, 114 Pa., 216.

Aetna Indemnity Co. v. *Fuller*, 111 Md., 321.

Hoyle v. *Scudder*, 32 Mo. App., 372.

Laclede Power Co. v. *Stillwell*, 97 Mo. App., 258.

Kalkhoff v. *Nelson*, 60 Minn., 284.

Rappleye v. *Racine Seeder Co.*, 79 Iowa, 220.

Bank Commissioners v. *N. H. Trust Co.*, 69 N. H., 621.

Stokes v. *Baars*, 18 Fla., 656.

Or by disposal, in advance, of the subject-matter of the contract, as in—

McGregor v. *Union Life Insurance Co.*, 121 F. R., 493 (C. C. A. 8th C.).

Camden v. *Jarrett*, 154 F. R., 788 (C. C. A. 4th C.).

Lowe v. *Harwood*, 139 Mass., 133 (Holmes, J.).
Hopkins v. *Young*, 11 Mass., 302.
Canada v. *Canada*, 60 Mass., 15.
Easton v. *Jones*, 193 Pa., 147.
Bagley v. *Cohen*, 121 Cal., 604.
Wolf v. *Marsh*, 54 Cal., 228.
Murphy v. *Dernberg*, 84 A. D. (N. Y.), 101.
Crist v. *Armour*, 34 Barb. (N. Y.), 378.
Bolles v. *Sachs*, 37 Minn., 315.
Smith v. *Jordan*, 13 Minn., 264.
Lovering v. *Lovering*, 13 N. H., 513.
Hunter v. *Wenatchee Land Co.*, 50 Wash.,438.
Palmer v. *Clark*, 52 Wash., 345.
White v. *Lumiere N. A. Co.*, 79 Vt., 206.
Smith v. *Carter*, 136 Mo. App., 529.
So. Tex. Tel. Co. v. *Huntington* (Tex. Civ. App.), 121 S. W., 242.
Guthiel v. *Gilmer*, 27 Utah, 496.
Teachenor v. *Tibbals*, 31 Utah, 10.

As this court pointed out in *Roehm* v. *Horst*, *supra*, where it exhaustively discussed the cases, the various forms of the anticipatory breach rest upon the same principle, which the court stated as follows:

> The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time of performance, as well as to a performance of the contract when due (p. 19).

and the court proceeded to refer with approval (p. 19) to the observation of Lord Chief Justice Cockburn, in *Frost* v. *Knight* (L. R. 7 Ex., 111), that—

> The promisee has the right to insist on the contract as subsisting and effective before the

> arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. While by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the nonfulfillment of the contract.

It makes no difference under this principle whether the repudiation is by words or by disability in fact, the failure to keep the contract in "unimpaired and unimpeached efficiency" is the same, and the effect upon the power and right of the injured party to protect himself against the certain future failure is the same.

This identity in principle between express verbal repudiation and disability in fact was recognized and directly applied in *Robertson* v. *Davenport* as shown by the statement of that case above, and it was also stated by this court in *Roehm* v. *Horst* in the course of its discussion of *Hochster* v. *Delatour*, as follows:

> In delivering the opinion of the court (Campbell, C. J., Coleridge, Earl, and Crompton, J. J.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of

> that the defense should be allowed. Insolvency of one party to a contract of sale is not always sufficient reason for refusal to perform by the other, for an assignee or trustee in insolvency or bankruptcy may find it for the advantage of the insolvent estate to complete the bargain, and, if so, he ought to have that right. But no one is obliged to give credit to one who is insolvent or bankrupt. Insolvency or bankruptcy affords a defense to any such contractual obligation, and payment may be required on delivery, though the contract expressly provides for a term of credit. And if a contract is of such a nature that an assignee can not carry it out, insolvency will excuse further performance by the other party. These seem to be the only cases in which prospective inability of one party is sufficiently certain to be a defense to the other party (pp. 354–355).

And elsewhere, in the course of his criticism of *Johnstone* v. *Milling* (16 Q. B. D., 460), Williston points out that:

> A distinction between inability and willful intention not to perform is not of practical value. As far as the performance of the contract is concerned they are of equal effect, and should be followed by the same consequences (p. 368).

In the case at bar, as has been said, there is no question of establishing the inability of the contractors to perform, for that fact is established by the authorized and conclusive finding of the engineer

in charge as well as by the facts. It must be taken, therefore, as a fact at the outset that the inability existed, and that the contractors, as Williston puts it, were *not going to perform their contract* and the Government was *not going to get what it bargained for.*

Thus the query propounded in *Jewett Publishing Co.* v. *Butler* (159 Mass., 517), by Mr. Justice Holmes, when a member of the Supreme Court of Massachusetts, is not applicable here. That query, which Mr. Justice Holmes reserved for the full bench, was whether General Butler was excused from performance on his side because he had doubts of the ability of the publishing company to proceed with the publication of his book, those doubts being found to be based on reasonable grounds. The full bench answered the query in the negative. Butler's judgment was not in that case of any binding validity under the contract, whereas here the judgment of the engineer in charge, by the authority of the contract, has established the inability as a fact. Also in *Butler's case* the court considered that the publication could have been accomplished, notwithstanding the matters which led to the doubt.

The argument that these defendants here, though they had been unable to proceed for eleven months and could not provide the required plant as demanded, might later have acquired the necessary funds by inheritance, loan, or otherwise, would have been equally applicable in any of these cases, and was in fact made and rejected in most of them. It was considered and rejected by this court in *Roehm* v.

Horst, supra, quoting the opinions in *Hochster* v. *Delatour* and *Pierce* v. *Tennessee Coal and Railroad Company* (173 U. S., 1).

The common-sense view, which the law has adopted is particularly illustrated by the facts of this case. The Government had already been delayed eleven months and it was confronted with the certainty of eighteen months' further loss of time in a work in which time was of great public importance. It was no more bound to submit to that loss, because of a mere theoretical chance that these contractors might within the eighteen months have a windfall which might remove their inability than were the Horst Brothers bound to wait on the chance that Roehm might have a change of mind which would remove his intention not to perform. Similarly any of the insolvents or bankrupts in the cases above cited might theoretically become rich before the time fixed for performance of their contracts, or the Insurance Company in *Lovell* v. *Insurance Co.* (111 U. S., 264, *supra*) might have been revived before the death of the insured.

These possibilities the law has weighed and rightly found to be overbalanced by the evils of uncertainty and excessive, unnecessary injury to the other party.

To test the question summarily, let us suppose that there had been in this contract no express right to "annul," and that in December, 1900, it had been the contractual obligation of the Government to take steps on its side involving expenditure of a

million dollars. Is it possible that the Government could have been required to stake that sum notwithstanding the plain inability of the contractors to proceed further? Yet only a breach by the contractors could excuse the Government from the required performance.

Some of the cases very properly point out the analogy between this principle of anticipatory breach of contract and the principle of *stoppage in transitu*. *Diem* v. *Koblitz*, 49 Oh. St., 41, *supra*. *Dougherty* v. *Central Bank*, 93 Pa. St., 227, *supra*.

C.

Also the finding of the engineer in charge that the contractors were unduly obstructing navigation was a finding of a breach of the contract.

The general conditions incorporated as a part of the contract required that "care shall be taken by the contractor that regular navigation is interfered with as little as possible" (fol. 20).

The breach of this requirement was one of the grounds of the annulment of the contract, as Major Goethals, in answer to the question, "Will you state to the jury and the court the facts which led you to this act of annulling this contract?" stated in his testimony as follows:

> The work was being done in a stretch of the river and in a stretch of the bay where there was considerable commerce. There were a great many complaints made by commercial interests that the dolphins were not kept

> lighted, and they were an obstruction to navigation, and both the scows and dredge were obstructions, especially during foggy seasons. Dolphins are clumps of piles driven to form a line to guide the dredge in its work (fol. 75).

. . .

And again he testified:

> I made up my mind in October that that contract should be annulled in the interest of the Government and of navigation (fol. 117).

D.

There was also a breach of "Clause B," the general remedial clause of the contract, because the contractors actually failed to complete the contract, and the "annulment," being valid, did not excuse this breach.

"Clause B" is as follows:

> It is further understood and agreed that, in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same (fol. 15).

The defendants, of course, did not complete the contract. The Government, therefore, in order to establish a right of action for this failure to complete, needs only to show that it had an excuse or defense for any share it may have had in preventing such completion. The "annulment" pursuant to the determination of Major Goethals, within the scope of his authority as arbitrator under the contract, affords a complete answer to any such suggestion and leaves the defendants without legal defense for their failure to complete as required by the contract.

"Clause A" and "Clause B" are properly to be read together, and, as we have pointed out above, no reasonable explanation can be given for holding them to be intended to contrast with each other. Both clauses provide for forfeiture of the retained pay and for reletting of the contract. The later clause is couched in most general terms and includes *all* failures to complete the contract, including the failure in case of annulment. For such a failure the contract gives no excuse to the contractors. This was the view of Judge Hazel on the demurrer in this case (*U. S.* v. *Perkins et al.*, 143 F. R., 688), which he stated as follows:

> Demurrants contend that the clauses relating to forfeiture of percentages and to recovery of compensatory damages are inconsistent with one another. I am unable to subscribe to the soundness of this contention, as defendant will be entitled to be credited with the

amount forfeited when the full measure of damages is ascertained. This is not a case where the contractors were without sufficient cause prevented by the other party to the contract from performance. The annulment, as alleged in the complaint, was owing to the failure of the contractors to seasonably comply with the understanding.

FOURTH.

THE PROVISION FOR "FORFEITURE" OF THE RETAINED PERCENTAGES AND MONEYS DUE IS A PROVISION NOT FOR LIQUIDATED DAMAGES, BUT FOR SECURITY ON ACCOUNT OF THE ACTUAL DAMAGES. THIS IS SHOWN BY NUMEROUS CONSIDERATIONS, INCLUDING CONCLUSIVELY THE REFERENCE TO REVISED STATUTES, SECTION 3709.

The pertinent portion of Clause A is as follows:

> And, upon the giving of such notice [i. e., notice of annulment by the engineer], all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (fol. 24).

The theory of the defendants was that this is a provision for liquidated damages, and that therefore the Government is not entitled to its actual damages.

A.

The reference to Revised Statutes, section 3709, is meaningless and mere surplusage unless it was intended that the contractor was to be liable for the excess cost of the completion of the job.

This section, 3709, Revised Statutes, is quoted in full above in the statement. It specifies the occasions on which the letting of contracts may be done by open contract and not to the lowest bidder after regular advertisement and taking of bids. It also provides the method of making the contracts under the ordinary conditions after such advertising, bidding, etc.

If the position of the defendants is correct and the contractors were not liable for the excess cost of completion of the contract, no possible reason can be suggested for binding them in the contract to an agreement that the Government might use the emergency clause of this section of the Revised Statutes.

If, on the other hand, their liability was to be the usual liability of the cost of completion, it is perfectly obvious that such an agreement from them would be desirable, because otherwise they might claim that the contract, being re-let without public competition, was re-let at an excessive price.

The theory of the majority of the Circuit Court of Appeals that the engineer's annulment was merely to sever the relations of the party and leave them *in statu quo* without further right or interest in reference to each other or to the contract, would make this incorporation of Section 3709 meaningless surplus-

age; for, so far as concerns any independent action by the Government upon the annulment, the statute itself, without ratification by Perkins & O'Brien, would have been its complete authority not only as against Perkins & O'Brien but as against the whole world. And as to any independent action by Perkins & O'Brien themselves, of what moment could it be to them how the work should be completed? Only an assumption that the engineer's annulment was to leave the parties still correlatively interested in the completion of the work can explain the incorporation of this statute into the contract between them, and the only possible correlative interest is the interest which both parties always have on the breach of a contract, viz, an interest in the amount of damages.

The plain purpose of the clause, and the only possible purpose, is to permit the Government, in case the contractors' failure has produced a sufficient public exigency, to measure its damages by the cost of completing the work under a contract let privately and informally, instead of measuring them in the usual way by such cost under a contract let formally and by public advertisement.

The majority of the court below rejected these considerations and expressed the opinion (fol. 145) that "the reference to section 3709 may be sufficiently accounted for on the theory that the contractor is thus forewarned that in case of annulment he must leave the work at once, because his successor may be selected and sent there without the delay resulting from re-advertisement."

Surely if this had been the intention not even the most inartistic draftsman would have chosen to express it by providing that the Government should be "authorized" to relet the work without advertising. Of course the contractors could be removed from the work immediately upon the termination of their right to be there under the contract. They would then become trespassers, and it would be their duty, without any specific provision, to remove from the premises.

Judge Ward's view concerning this clause is thus stated in his dissenting opinion:

> It [the reference to R. S., sec. 3709] is not satisfactorily explained as a warning to the contractors that they may have to leave the work at once if the United States re-let without advertisement, because upon the annulment of the contract they would have to leave, whatever course the United States pursued in respect to re-letting. Unless the contractors were to be liable for the loss, if any, of reletting, I do not see why the statute was referred to (fol. 148).

It is submitted that in this the dissenting judge was plainly right.

B.

The amount of the so-called liquidated damage, instead of having any reasonable relation to the expected actual damage, would vary inversely with it; for the nearer the contractors came to completing the work, the larger would be the accumulated reserved moneys, and vice versa.

It is therefore not reasonable to suppose that the parties intended that these reserved percentages should constitute liquidated damages.

The amount of the so-called liquidated damages is defined (fol. 24) merely as whatever money or reserved percentages might happen to have been retained from the contractors. Ten per cent was to be reserved each month out of the pay due that month, and therefore the more work which the contractors did the larger would be the damages they would have to pay; and, conversely, the less the Government was damaged the more it would receive.

It is absurd to suppose that the parties intended that the remedy in case of annulment should be not only an arbitrary and accidental amount, but one which in its very terms would certainly vary inversely with the actual damage.

This point was emphasized by Judge Ward in his dissenting opinion, as follows:

> As a measure, forfeiture would be most unsatisfactory—inadequate if the annulment were declared early in the work, and perhaps excessive if declared later.

It was upon this line of reasoning that in *Ex parte Pollard* (2 Lowell, 411) a fixed sum of $10,000—described in the agreement as "by way of liquidated damages"—was held, nevertheless, to be a penalty. The court said:

> The decisive point in this case is that this contract was to run for ten years; and it can hardly be believed that the parties intended

> that the same amount should be paid for a breach in the last month of the tenth year as for one in the first month of the first year (p. 413).

Other illustrations of the same line of reasoning are:

> *Taylor* v. *Steamer Marcella*, 1 Woods, 302.
> *Davis* v. *Fremont*, 10 Mich., 188.
> *Heatwole* v. *Gorrell*, 35 Kans., 692, in which numerous other cases are cited.

Davis v. *Fremont* is curiously analogous on the facts, though the language of the contract expressly used the words "liquidated damages." The contract there was that the plaintiffs in error were to have $1.50 per 1,000 feet for growing timber, $1 of which was to be paid as the timber was drawn and the remaining 50 cents was to be "kept back to secure the completion of the contract," it being further "agreed between the parties that this 50 cents per 1,000 feet is settled, fixed, and liquidated damages in case this contract is not completed by the said first party." The court below held that the 50 cents was in fact liquidated damages, but in this it was reversed by the Supreme Court, owing to the fact that, under such a construction "the nearer the contract is completed the greater are the damages in case of failure."

In *Heatwole* v. *Gorrell* the contract contained a penalty of $500 for breach of an obligation not to engage in business at a certain place for a period of five years. After pointing out that this was stated to be a penalty and not stated to be liquidated damages or damages of any kind, the court said that it

The *Maloney case* has since been followed on its own facts by the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Stone, Sand and Gravel Co.* (177 F. R., 321).

The distinction drawn disregards the fact that, while the clause does state two distinct causes of annulment, it provides for only one consequence of annulment, from whichever cause it may arise. In other words, the two groups of grounds for annulment are drawn together and welded into a single, inseparable consequence, and it is doing violence to the contract to hold that this single consequence is intended to be "liquidated damages" in one case and not "liquidated damages" in the other.

Considering this bifurcation of the basis for the "forfeiture" in "Clause A," and also considering the basis for the similar "forfeiture" in "Clause B," the distinction rested on by the court below would bring about this extraordinary and impossible situation in the construction of the contract:

1. If the annulment was for failure of the contractors to begin work on the date specified, then the "forfeited percentages" *would not* have been intended to be "liquidated damages."

2. But if the annulment was for failure to satisfy the engineer with the rate of progress, then the same forfeited percentages *would* have been intended to be "liquidated damages."

3. But, again, if the contractors failed to finish the work on the final day specified, the same forfeited percentages *would not* have been intended to be liquidated damages.

D.

The use of the word "forfeited" indicates that the sum was not intended to be liquidated damages. (*Taylor* v. *Steamer Marcella*, 1 Woods, 302, 304.) The same word is used twice elsewhere in the same contract and in substantially the same connection, and both times in the sense merely of security on account of damages. I refer to the later and parallel clause at folio 26 ("Clause B"), which is as follows:

> It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be *forfeited* to the United States, and that the said United States shall also have the *right to recover any or all damages due to such failure in excess of the sums so forfeited, and also* to recover from the party of the second part, *as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated* to be paid to the party of the second part for completing the same (fol. 26).

Here it is perfectly clear that, though the word "forfeited" is used, it is intended as merely a retention on account of actual damages, and that the recovery ultimately to be made is to be the damages over and above that amount.

No reason has been suggested why liquidated damages should be intended by the word "forfeited" in Clause A and not intended in this Clause B.

In fact, the two clauses are closely parallel in their language and are plainly intended to reach the same result. They both refer to the retained percentages as "forfeited" and they both proceed to provide for damages on the basis of any excess cost under the relet contract, the former clause doing this by its reference to Revised Statutes, section 3709, and the latter clause by equivalent direct language. There is no reason to suppose that these two parallel clauses were intended to give totally different remedies for injuries of substantially the same character and consequences.

E.

The later form of contract used in the reletting of the work after the failure of Perkins & O'Brien reproduces the clause here in question with an express provision explaining the meaning exactly in conformity with the construction which the Government contends for, and in connection therewith it repeats the reference to section 3709 of the Revised Statutes, and adds thereto the plain statement that the Government shall have the right to recover damages.

This change is clearly declaratory, as is conclusively shown by the fact that it is made also in the later "Clause B" above quoted (fols. 91 and 26), where it is unquestionably a change only in phraseology and not in substance, the original form having explicitly explained the word forfeiture as security for actual damage (fol. 26).

It was urged by counsel for the surety company that this later form of contract was *alternative* to the form of the Perkins & O'Brien contract and they ingeniously argued that the Perkins & O'Brien form must have been intended to be a liquidated damage contract because it did not contain a bracketed note, like the form used in the succeeding contract, which read: "(To be used when the specifications do not call for liquidated damages" fol. 88). Of course this is mere speculation. Indeed, if the forms had been intended to be alternative, it would be natural to suppose that they would *both* have been identified by notation. The fact was that the successor contract was a form *subsequently* adopted by the War Department to supersede the Perkins & O'Brien form (fol. 103). The changes are plainly declaratory and they were so regarded by the engineer department, for Major Goethals himself testified that the new form presented exactly the same obligations to the new contractors as were originally presented to Perkins & O'Brien (fols. 91–26).

F.

The case is not one in which the parties would be likely to desire liquidated damages, because not only would the actual damages be readily ascertainable after the event (*Taylor* v. *Steamer Marcella*, 1 Woods, 302, 304, *supra*), but they would be practically incapable of any estimation in advance of the event.

G.

Under the established law, as illustrated by many cases in addition to those already cited under this point, these features make it perfectly plain that the retained percentages are not "liquidated damages," but penal security on account of the actual damages.

This contract was let on November 16, 1898 (fol. 23), and prior thereto the clause in question had been repeatedly construed by administrative officers and by courts as not involving liquidated damages.

2 Comp. Dec., 579 (1896).
20 Op. Atty. Gen., 511 (1893).
Kennedy v. *U. S.*, 24 Ct. Cl., 122 (1889).
Pigeon v. *U. S.*, 27 Ct. Cl., 167 (1892).
Satterlee v. *U. S.*, 30 Ct. Cl., 31 (1895).
U. S. v. *Maloney*, 4 App. Cas. (D. C.), 505, *semble*, *supra* (1894).

Since the execution of the contract the Circuit Court of Appeals for the Fifth Circuit, in *U. S.* v. *Stone, Sand & Gravel Co.* (177 Fed. Rep., 321, 326, *supra*), has rendered a decision to the same effect in reference to this identical form of contract. The court said:

> Likewise, in reference to the word "forfeiture," we see nothing here to justify us in construing the provision in which that word is used to mean liquidated damages. To the contrary, it seems clear to us that in contemplation of the parties it signified a penalty to be looked to for the satisfaction pro tanto of such damage as might actually be incurred.

In *Langdon* v. *Northfield* (42 Minn., 464) there was under consideration a contract containing the following very similar clause:

> If the second party (defendants) shall at any time neglect or refuse to proceed with the work as fast as, in the opinion of said chief engineer or the first party (communicated in writing to the second party), may be necessary for the completion by the time specified herein, then the first party (plaintiffs) may declare this contract abandoned, *and the amount which shall have been retained at the time out of the monthly estimates which have become due at the completion of this contract shall be forfeited to the first party;* or the first party may, at their option, employ other parties to execute any part of the work and charge the cost of the same to the second party, to be deducted out of such retained percentage, or out of any payment that shall have become due on any former estimates, or that may become due on any subsequent estimate.

This was held not to be liquidated damages, and the right to reimbursement was held not to be limited to the amount of the retained percentages, even though the clause stated that the actual damages were "to be deducted out of such retained percentage."

In *Jackson* v. *Cleveland* (19 Wis., 400) the contract provided that 15 per cent of the monthly estimates should be retained until the work was completed and accepted by the engineer. It also contained a clause authorizing the engineer to declare it null and void

if he found "that the work is not progressing with sufficient rapidity to insure its completion within the specified time." After the termination of the contract under this clause action was brought to recover back the retained percentages. The defendant set up a counterclaim for damages for failure to complete. In regard to the claim that the retained percentages were liquidated damages the court said:

> We regard this 15 per cent as a fund in the hands of the defendant to indemnify him against any damages which he might sustain on account of the breach of the contract by the plaintiffs. Such being the object of the retention of this fund, the defendant should of course apply upon his damages this 15 per cent retained by him, and only have judgment for any excess of damages, if any were found due him. * * * The language of the contract upon this point, after providing for the time and manner of paying the 85 per cent, is as follows: "The remaining 15 per cent to be retained until the contract is completed and accepted by the engineer." This language shows, we think, that this 15 per cent is not to be regarded as in the nature of liquidated damages for a breach of the contract, but rather as a penalty or fund to insure the proper completion of the work (p. 410).

This decision was reiterated in another case involving retained percentages. *Dullingham* v. *Fitch* (42 Wis., 679).

Quinn v. *U. S.*, 99 U. S., 30, arose under a contract not precisely the same in form as that here involved,

and not containing the word "forfeited," but nevertheless substantially the same in spirit. The particular clause construed was the following:

> If, in any event, the contractor shall delay, or be unable to proceed with the work in accordance with its terms, the engineer officer in charge shall have full right and authority to take away the contract and employ others to complete the work, deducting the expenses from any money that may be due and owing him, and the contractor will be responsible for any damages caused to others by his delay or noncompliance.

The court held that where the Government had not been at any actual damage it could not withhold the retained percentages, and this holding was therefore in effect that the retained percentages were not liquidated damages.

In *Savannah Railroad Co.* v. *Callahan*, 56 Ga., 331, the contract provided that 10 per cent of each monthly estimate for the work involved should be "reserved by the company as security for the performance of the contract * * * to be retained by the company as stipulated damages in the event that the contractors should fail to perform by the time and in the manner specified." Notwithstanding the description of these reserved percentages by the contract itself as "stipulated damages," they were held not to be stipulated damages but a penalty.

Easton v. *Pennsylvania & Ohio Canal Co.*, 13 Ohio Rep., 79, was cited below by counsel as an authority

for the proposition that such reserved percentages are liquidated damages. It is true that the court did there say that the percentages were "liquidated damages," but they were not considering the distinction between penalty and liquidated damages, but only the question whether the defendant was bound to pay them back, notwithstanding a valid annulment of the contract and consequent actual damages. It was entirely immaterial whether the reserved percentages were penalty or liquidated damages, and it is very evident from the opinion that the court did not mean to hold that they were liquidated damages as distinguished from penalty. In fact, the court itself describes them as "security."

These decisions upon the identical or substantially identical clauses are in full accord with the law as thoroughly established by this court in its two corelative lines of decisions, one illustrating the circumstances under which a contract is held not to involve liquidated damages (*Tayloe* v. *Sandiford*, 7 Wheat., 13; *Van Buren* v. *Digges*, 11 How., 460, 477; *Watts* v. *Camors*, 115 U. S., 353, 360) and the other, conversely, illustrating cases which did involve liquidated damages. (*Sun Printing Assn.* v. *Moore*, 183 U. S., 642; *U. S.* v. *Bethlehem Steel Co.*, 205 U. S., 105, 121.)

The case of *Van Buren* v. *Digges* is exactly in point. The court there held:

> The clause of the contract providing for the forfeiture of ten per centum on the

> amount of the contract price, upon a failure to complete the work by given day, can not properly be regarded as an agreement or settlement of liquidated damages. The term forfeiture imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless therefore it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz, that of a penalty (p. 477).

In *Tayloe* v. *Sandiford* a provision in a building contract that "the said houses (are) to be completely finished on or before the 24th day of December next, under a penalty of $1,000 in case of failure," was not a provision for liquidated damages.

In *Watts* v. *Camors* a clause providing that the parties bound themselves "to the true and faithful performance of all and every of the foregoing agreements," "in the penal sum of estimated amount of freight," was held to be not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of actual damage. The court was influenced not only by the use of the word "penal," but by the fact that the amount was to cover alike an entire refusal to perform the contract and a

failure to perform it in any particular, however slight, whereas a just compensation could be estimated in damages for any actual breach, whether total or partial. The court therefore said:

> In such cases, accordingly, the courts of the United States, sitting in admiralty, award the damages actually suffered, whether they exceed or fall short of the amount of the penalty (p. 361).

See also *Martin* v. *Taylor*, 1 Wash. (U. S.), 1.

On the other hand, in the *Sun Printing Association* case, where the value of a yacht hired was stipulated to be $75,000, it was held that this sum was liquidated damages, as the actual damages to be anticipated were of an uncertain nature, and the sum so fixed had a reasonable relation to a loss of the yacht; and in the *Bethlehem Steel Company* case a provision for a deduction of $35 a day for delay in the delivery of gun carriages on a government contract was held to be not so disproportionate to the damage which might result as to show that the parties could not have intended it to be liquidated damages.

Under the definition thus established the present case is plainly not an instance of liquidated damages, and therefore must be one in which the reservation is for security on account of the actual damages.

FIFTH.

THE DEFENDANTS IN ERROR WERE NOT RELIEVED FROM THEIR OBLIGATIONS UNDER THE CONTRACT, EITHER BY REASON OF THE NONPAYMENT OF THE $97.67 FOR BOARD OF AN INSPECTOR OR BY REASON OF THE NONPAYMENT FOR THE FRAGMENTARY WORK DONE IN THE INTERVAL BETWEEN THE PRELIMINARY NOTICES OF INTENTION TO ANNUL AND THE FINAL FORMAL ANNULMENT; FOR THOSE NONPAYMENTS WERE JUSTIFIED, AND THEY WERE ALSO OF TRIFLING AND IMMATERIAL AMOUNTS.

It nowhere appears that the $97.67 was ever demanded, and therefore that item need not be further particularly discussed.

It was also claimed in the court below that the Government was itself in default under the contract for nonpayment for the work done in the interval between the preliminary notices of the intention to annul and the final formal act of annulment.

On this point the court below was with the Government (fol. 145).

Payments for the work done each month were made regularly about the middle of the following month up to the payment of July 17, 1900, which was for the work done in June, 1900 (fol. 100).

In July, 1900, no work was done (fol. 100).

In August, 1900, no work was done (fol. 100).

In September, 1900, only 2,854 cubic yards were excavated (fol. 100), for account of which, after deduction of the reserved percentage, the sum of $277.41 would ordinarily have been paid about the middle of October.

In October, 1900, only 9,607 cubic yards were excavated (fol. 100), for account of which $933.80

plainly justified in discontinuing payments, at least until the requisite rate of work had been resumed.

A similar situation occurred in the case of *Woolner* v. *Hill* (93 N. Y., 576, *supra*), where the plaintiff was under contract to purchase 500 barrels of alcohol monthly from the defendants, and to pay for the same on delivery, and to notify the defendants in advance of delivery the name of the vessel and the number of the pier to which delivery was to be made. It was held that the plaintiff was excused from these requirements by the prior breach of the defendants in making an assignment for the benefit of creditors and thereby becoming unable to perform, under the principle hereinabove discussed; and the plaintiff was therefore held entitled to maintain an action for damages on the failure to deliver, notwithstanding its own failure to fulfill the prescribed conditions. So in the case at bar, the Government is entitled to maintain this action, notwithstanding the nonpayments, because prior to those nonpayments the defendants had themselves committed a breach of the contract by becoming unable to perform it, as the arbitrator found.

B.

The amounts of the nonpayments were relatively insignificant and for a trifling proportion of the work and therefore they would not have relieved the contractors from their obligations under the contract even if they had not been justified.

That the Government's alleged breach was not an essential one is shown by the following figures:

Total work contracted for 2,036,491 cubic yards (fol. 23).
Left undone by P. & O'B. 1,365,527 cubic yards (fol. 76).
Amount not paid for 11,215 cubic yards (fol. 100).

Contract price for total work	$219,941.03
Amount paid to P. & O'B	52,000.00
Amount left unearned by P. & O'B	147,477.99
Amount paid to new contractors	224,740.85
Damages finally proved	76,470.07
Amount of alleged default	1,308.88

Thus it appears that what the plaintiffs in error now claim was improperly withheld by the Government amounted only to about 2 per cent of what the contractors had already been paid, about five-sixths of 1 per cent of what they had yet to earn under the contract, five-ninths of 1 per cent of what the Government paid to the new contractors upon default by Perkins & O'Brien, and about 2 per cent of the actual damages proved by the Government. Surely, as Major Goethals said in the following letter quoted by Secretary Root to the defendant O'Brien, the nonpayment of so paltry a sum can not be deemed to have been material:

> There was due Perkins & O'Brien under their contract at the time of its annulment the sum of $2,514.28.[a] Of this amount, $2,236.87 was earned after steps had been taken to terminate the contract and under which circumstances I was not warranted in the interests of the United States to make payment. The writer can hardly, in justice, contend that this

[a] This includes amount for December work which was not payable until after the "annulment."

comparatively small sum could have secured the additional plant on which the continuance of the contract depended (fol. 108).

As, then, the alleged breach (if it was a breach) was immaterial, it did not relieve the principals from their obligations under the contract.

Philip Hiss Co. v. *Pitcairn*, 107 Fed. Rep., 425.
Evans v. *Howell*, 211 Ill., 85, 92.
Palmer v. *Meriden Co.*, 188 Ill., 522.
Feeney v. *Bardsley*, 66 N. J. L., 239.
Russell v. *Commissioners*, 123 N. C., 264.
Anderson v. *Harper*, 123 Wash., 378.
Lennon v. *Smith*, 23 N. Y. A. D., 293.
Mills v. *City*, 59 Kan., 463.
Williston's Wald's Pollock on Contracts, pp. 324 and 326, n. 9, and cases cited.

In *National Machine and Tool Co.* v. *Standard Shoe Machinery Co.*, 181 Mass., 275, it was held that non-payment of a small sum of $90 was a breach of the contract under the particular circumstances of the case, because the plaintiff was rightfully "sensitive" at the appearance of uncertainty in the payments, and by failure to pay another bill for a large amount. Mr. Justice HOLMES, then Chief Justice of the Supreme Court of Massachusetts, who wrote the opinion, expressed doubts on this point even under these circumstances, saying,

> The question before us therefore is whether the defendant's failure to pay $90 promptly was a breach going to the root of the contract—a breach so important as to warrant the plaintiff in refusing to go on without defeating his own

right to recover upon it or rescinding the contract. My brother Loring and I have not been able to reach a clear conviction that it was such a breach, in view of the smallness of the sum, the indefiniteness of the terms of the contract as to the time for payment (see *Harden* v. *Milwaukee Mechanics' Ins. Co.*, 164 Mass., 382; *Parker* v. *Middlesex Mut. Assn. Co.* 179 Mass., 528, 531), the shortness of the delay, and some other circumstances. Of course not every trifling breach of contract excuses the other side from further performance. *Honck* v. *Muller*, 7 Q. B. D., 92, 100; *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas., 434, 444; *Dubois* v. *Del. & Hudson Canal Co.*, 4 Wend., 285, 289; *Wright* v. *Haskell*, 45 Maine, 489, 492; *Weintz* v. *Hafner*, 78 Ill., 27, 29; *Worthington* v. *Gwin*, 119 Ala., 44, 54.

But my brethren are of opinion, and I dare say wisely, upon the findings, that the plaintiff was warranted in its course (p. 279).

It is perfectly evident from the record that the contractors themselves did not consider that there had been any breach of the contract, or if a breach, any material breach. The point is plainly an afterthought. The contractors made no suggestion of a demand for payment until December 13, 1900, when the defendant, O'Brien, at the end of his letter promising to proceed, incidentally said: "Will you please give me an estimate for last month, and oblige?" (fols. 57, 58)[a]. As appears particularly by this very letter, written long after the Government's

[a] Mr. O'Brien's reference is assumed to have been to the October work, for there was no work done in November (fol. 101).

alleged defaults, they still considered themselves bound under the contract, and in fact they continued spasmodic work and promises of improvement directly up to January 1, 1901 (fols. 109, 115, 68).

In an installment contract such as this, where the times of payment are not precisely fixed, but are merely stated in the most general way to be "monthly" (fol. 26), and where they are not stated by the contract in any such fashion as to indicate that precise promptness was intended as a condition precedent to the obligation of the contractors to continue performance, the omission to pay such trifling installments is peculiarly immaterial. Indeed, it here appears that under the practice of the parties the payments under this contract were made most irregularly in time (fol. 100), and yet were recognized as not improperly so made (see the defendant O'Brien's casual request, above referred to, on *December 13* for an estimate of the *October* work fol. 57). The times of payment were contingent, for example, on the question whether the requisite funds were in the hands of the local officers (fol. 99). The customary method of payment was testified to by Major Goethals, as follows:

> The estimates were usually prepared in the office shortly after the close of the month. The vouchers covering the amount to be paid were made out, forwarded to the contractors for signature, and after return by them, if the necessary funds were to the credit of the officer in the proper depository, he drew a

> check for the amount. I am not prepared to state that funds were always in this contract in the depository sufficient to pay. Each month we would make a request on the Treasury Department for certain funds to pay for prospective work. There were always delays in filling our requisitions. We have to wait as long as three months (fol. 99).

Consequently, the case falls within the principle recognized in *Norrington* v. *Wright* (115 U. S., 188, p. 210), where this court distinguished *Mersey Co.* v. *Naylor* (9 A. C., 434) and *Freeth* v. *Burr* (L. R. 9 C. P., 208), as follows:

> But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it.

The principle of this dictum of this court was directly held by the Circuit Court of Appeals for the Sixth Circuit in *Monarch Cycle Co.* v. *Royer Wheel Co.* (105 F. R., 324), in which Judge (now Mr. Justice) DAY wrote the opinion. That was an action upon a contract by which the plaintiff was to deliver bicycles to the defendant in installments upon specification, the defendant to make payments in installments. The complaint alleged that defendant had not given any specifications, as he was required to do. Defendant pleaded that the plaintiff had not delivered

the cycles as required, and he counterclaimed for that failure. The plaintiff replied that the defendant had failed to make the payments. Notwithstanding this failure to make payments, the defendant succeeded in the trial both on his defense and on his counterclaim. The plaintiff thereupon appealed, assigning error in the *refusal* of the court to instruct the jury as follows:

> That if defendant violated said contract in neglecting or refusing to make remittances from time to time for wheels already furnished and as required by the contract that the plaintiff was not required to make further shipments until settlements were properly made under said contract; and if the defendant violated the contract in either of the above particulars the plaintiff was justified in stopping shipments (p. 328).

The trial court, on the contrary, had charged that the plaintiff could not properly refuse to make further shipments unless the defendant's failure to make payments indicated a repudiation of the contract. The appellate court held that this charge and this refusal to charge were proper.

See, also,

> *Michigan Yacht Co.* v. *Busch*, 143 Fed. Rep., 929, 932 (C. C. A., 6th C.), Judge (now Mr. Justice) LURTON writing the opinion.
>
> *Cherry Iron Works* v. *Florence Co.*, 64 Fed. Rep., 569 (C. C. A., 6th C.).

C.

The cases cited by the defendants in error in the court below in support of their contention concerning these nonpayments are all distinguishable on the grounds above indicated.

In *Canal Co.* v. *Gordon* (6 Wall., 561), the nonpayment was of a very substantial amount, $20,000 (p. 563), or over a quarter of the aggregate, which was $76,589.89 (pp. 568, 572). Also in that case there had been no prior breach by the contractor, and he had sued upon the nonpayment "*on the very day*" [a] it occurred.

Phillips v. *Seymour* (91 U. S., 646) also involved the nonpayment of materially large sums and an immediate insistence upon the nonpayment as a breach.

Pidgeon v. *U. S.* (27 Ct. Cls., 167) involved a nonpayment of $5,065.47, or more than one-third of the total amount of work, aggregating $14,879.39 (p. 176); and the claimant served notice that without the payment he was unable to proceed (p. 173). In that case a prior default of the contractor which would have excused the nonpayment had been forgiven (p. 175). The contractor also refused to proceed with the work and stood upon the nonpayment.

Ricker v. *Fairbanks* (40 Maine, 43) merely held that the amount retained was due and could be recovered. In the case at bar it was deducted by the

[a] The italics are the court's. The court said: "The day is important."

Government from the demand at the beginning of the trial (fol. 53).

Henderson Bridge Co. v. *O'Connor et al.* (88 Ky., 303) and *O'Connor et al.* v. *Henderson Bridge Co.* (95 Ky., 633) involved nonpayments of the large amount of $33,760.24 "without which the contractors could not further comply with and perform all the terms of the contract."

Graf v. *Cunningham* (109 N. Y., 369), clearly involved a *material* breach as well as other special considerations which are not here involved, but which are stated in the opinion.

D.

The contractors having, therefore, been bound to continue performance, notwithstanding these excusable and immaterial nonpayments, the surety likewise remained bound.

The contract is of course the same, whether as against the principal or as against the surety, and it is in terms a breach by the principal of his duty which fixes the liability of the surety under its bond (fol. 28).

If a breach by the other party be immaterial, so that, notwithstanding it, the duty of the principal still subsists under the contract, then the duty of the surety likewise subsists (*Hand Mfg. Co.* v. *Marks* 36 Oreg., 523, 531).

The point is substantially disposed of by the decision of this court in *Cross* v. *Allen* (141 U. S., 528), in which it was held that even where the terms of the

contract were not merely broken but actually changed the surety is not discharged where the change is not material.

Other decisions in line with the *Cross* case are:

Roach v. *Summer,* 20 Wall., 165.
Harper v. *National Co.,* 56 Fed., 281.
Fertig v. *Bartles,* 78 Fed., 866.
U. S. Glass Co. v. *Mathews,* 89 Fed., 828.
United States v. *Freel,* 92 Fed., 299.
United States v. *Hodge,* 6 How., 283, in which the Court said:

> The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured.

CONCLUSION.

The judgment should be reversed and a new trial ordered.

WINFRED T. DENISON,
Assistant Attorney-General.

NOVEMBER, 1910.

○

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 105.

The United States, *Plaintiff in Error*,

v.

John J. O'Brien, Individually and as a Member of the Firm of Perkins & O'Brien; and Stephen Farrelly as Ancillary Receiver of the City Trust, Safe Deposit and Surety Company, of Philadelphia.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Brief for Defendants in Error.

FREDERIC J. SWIFT,
GEORGE A. KING,
WILLIAM B. GONGLER,
Counsel for Defendants in Error.

available, ten (10) per cent being reserved until the total amount thus retained is equal to ten (10) per cent of the cost of completing the remainder of the contract as estimated by the engineer officer in charge."

The contract proper (Record, p. 15) reaffirmed this provision of the specifications as follows:

"Payments shall be made to the said Perkins and O'Brien monthly, based upon amount of material removed, in the manner specially provided for in the specifications."

The specifications also provided (Record, p. 10):

"37. The amount at present available for the work is $125,000, from which must be provided funds for superintendence and contingencies of the work. The total amount of work under these specifications and for which bids are now invited is estimated at 2,036,491 cubic yards."

Also (Record, p. 11):

"42. Actual work of dredging must be commenced by the contractor on or before March 1, 1899, and be completed by July 1, 1902. Should operations be suspended awaiting appropriations, the time allowed for completion of contract may be correspondingly extended, and the operation of paragraph 35 of these specifications will be suspended for a similar period.

"43. When available funds are exhausted the contractor will be notified and he shall then have the option to continue the work as rapidly as possible under the law and contract, relying upon future appropriations for payment or suspend operations until such appropriations are actually made and available."

The provision of the specifications as to time of completion was also carried into the contract proper as follows (Record, pp. 13 and 14):

"The said Perkins and O'Brien shall commence work

on or before the first day of March, eighteen hundred and ninety-nine (1899) and shall complete the work on or before the first day of July, nineteen hundred and two (1902)."

The specifications also provided in paragraph 49 (Record, p. 11), that the contractor must "when he supplies his working force with board and lodging, also supply same at a reasonable price for the inspector or inspectors if required, to be paid for by the United States."

The contract also contained the following provision (Record, p. 14):

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States:"

followed by a proviso not here material.

After four other paragraphs occurs the following provision (Record, p. 15):

"It is further understood and agreed that in case of failure on the part of the party of the second part to com-

plete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

The contract was accompanied by a bond for its faithful performance (Record, pp. 16 and 17) the surety on which was the City Trust, Safe Deposit and Surety Company of Philadelphia.

Proceedings under the Contract.

Work was begun by the contractors under the contract. The monthly partial payments provided for therein were regularly made down to the 17th day of July, 1900, when the Government made then the monthly payment for work done in June, 1900. This was the last payment made (Goethals, Record, p. 56).

In September, 1900, 2,854 cubic yards were dredged, the contract price of which was $308.23. In October, 9,607 yards were dredged, the contract price of which was $1,037.56. In December, 13,406 cubic yards were dredged, the contract price of which was $1,447.85. The total of the work thus done in September, October and December was 25,867 cubic yards, the contract price of which was $2,793.64. In addition to that amount there was also the sum of $97.67 due for board of inspectors under paragraph 49 of specifications (Record, p. 11, quoted *ante*, p. 3). These sums aggregate $2,891.31, none of which was ever paid or tendered (Goethals, Record, p. 57).

On the 4th of December, 1900, the engineer officer in charge wrote the contractors as follows (Record, p. 31):

"Under authority of the Chief of Engineers, U. S. A., I am authorized to inform you that unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled."

After an ineffectual application by Mr. O'Brien, one of the contractors, for an interview (Record, p. 32), the engineer officer in charge wrote the contractors and their surety as follows (Record, p. 33):

"U. S. ENGINEER'S OFFICE,
"NEWPORT, R. I., *December 31st, 1900.*

"To Messrs. Perkins & O'Brien, 253 Broadway, New York, N. Y., and the City Trust, Safe Deposit & Surety Company of Philadelphia, Pa., 160 Broadway, New York, N. Y.

"GENTLEMEN: As the work under your contract for dredging in Providence River and Narragansett Bay, R. I., has not, in my judgment, been prosecuted faithfully and diligently, by authority of the Chief of Engineers, U. S. Army, and with his sanction, I have to inform you that the contract is hereby annulled.

"GEO. W. GOETHALS,
"*Major, Corps of Engineers, U. S. A.*"

The work of dredging under the contract proceeded right up to the date of this letter of annulment (foot p. 33). Thereafter the work was relet, after advertisement, to another contractor at an increased rate (Record, pp. 43 to 52).

The Suit and Proceedings Therein.

This action was brought by the United States against Perkins & O'Brien as contractors, and the City Trust, Safe Deposit and Surety Company of Philadelphia as

surety (the defendant Perkins not being served, p. 29), to recover the sum of $76,247.85 (p. 5); which sum, it is alleged, represents the difference between what Perkins & O'Brien contracted to do the work of dredging Narragansett Bay and Providence River for, and what the work actually cost the Government.

Suit was commenced on the 21st day of October, 1904 (p. 3).

The case was first brought on for trial January 30 and 31, and February 1, 1907 (p. 29), before Judge Hough; and the plaintiff recovered judgment. The case was carried by writ of error to the United States Circuit Court of Appeals for the Second Circuit, by whom the judgment was reversed and a new trial directed. The opinion of the court is found in the Record (pp. 77 to 81) and is also reported 159 Federal Reporter, 671. The two clauses of the contract quoted, *ante*, pp. 3, 4, are contrasted, and their respective purposes distinguished. The court concludes (Record, last half p. 79):

"It is assigned as error that the judgment entered against plaintiffs in error included damages arising from excess cost of completion, and in the opinion of a majority of the court the point is well taken. The general provision in the later clause for forfeiture and damages 'in case of failure to complete as specified and agreed upon' does not apply, because on January, 1901—a year and a half before the expiration of the time limited—there had not been a 'failure to complete,' and because the annulment clause does not refer to the later provision, but provides its own punishment for the negligent contractor, viz. exclusion from the work and forfeiture of all sums due him. If the rule for assessing damages were to be found in the general clause, it is difficult to understand why the draughtsman dealt with that subject in the annulment clause. Being a form prepared by the party of the first part, and in the preparation of which the contractor took no part, any ambiguities in its language are to be con-

strued against the party preparing it. But we find no ambiguity; the expressed intention is that exclusion and forfeiture of all money due him is the penalty which a negligent contractor must pay when his contract is annulled."

The new trial was had before Judge Hough, on the 10th day of April, 1908 (p. 20), and judgment was entered dismissing the complaint upon the merits (p. 28). A second writ of error was taken, and this judgment affirmed on the authority of the opinion on the first writ of error (See Opinion, p. 72).

The United States have brought the case to this court by writ of error (Record, p. 75).

II. BRIEF OF ARGUMENT.

Statement of the Issues.

Before making our points in this brief, we desire—especially as we find no distinct specification of errors—to set forth a few pertinent facts.

The contractors, Perkins & O'Brien, on November 16, 1898, entered into a contract (Exhibit A, p. 13), with the United States, for dredging in Narragansett Bay and Providence River, and the City Trust, Safe Deposit & Surety Company gave its bond in the sum of $30,000 conditioned for the faithful performance of said contract (Exhibit B, p. 16). This contract called for the removal of about 2,000,000 cubic yards of material at 10.8 cents per cubic yard (p. 13). *The work was to be commenced by March 1, 1899, and to be completed by July 1, 1902* (p. 13). The full time for completion was forty months. There was no designation as to how much work was to be done during any stated time. This is admitted on page 31 of the Government's brief, and Judge Lacombe stated (p. 79) " * * * there is no clause in the contract directing that he shall perform some specified part of the

work within some specified time, or even that he shall do some work each month." The contractor commenced the work in accordance with the terms of the contract, *as specifically alleged in the 4th paragraph of the complaint in this action* (p. 4), and continued for 22 months until the contract was annulled December 31st, 1900 (p. 61). At page 66, the court stated in reference to the claim that Perkins & O'Brien never quit the work until they were put off by the Government, as follows: "That will be understood."

About one-quarter of the work had been completed at that time (p. 41). Eighteen months still remained in which to complete according to the terms of the contract. The contract was annulled under the provision "*more particularly marked and designated*" in the complaint *as Exhibit A1* (p. 4 and p. 14), which provided that if the contractor should fail to prosecute the work to the satisfaction of the engineer, the contract might be annulled by giving notice in writing, and upon giving such notice, all money or reserved percentages due or to grow due the contractors *should be forfeited to the United States*.

The contract provided the only penalty which the contractor should suffer if his contract were annulled, namely, forfeiture of all money due and retained percentages. The United States then advertised for proposals for completing the work (pp. 5 and 43). *The work was not completed by private or open contract under sec. 3709, of the Revised Statutes, and that provision of the contract therefore never became operative.* The International Contracting Company was the lowest bidder (p. 49) and the Government entered into a contract with said International Contracting Company (p. 49). The Dredging Company completed the contract at the alleged cost in excess of the Perkins & O'Brien contract claimed in the complaint, and it is this excess cost which the Government seeks to

recover from the contractors and the surety in this action, less the forfeited moneys it now offers to deduct from the excess cost. *But it will be noticed that in the complaint herein (p. 5), judgment for the full excess cost is asked for.*

The Perkins & O'Brien contract will be found beginning at page 13. The contract with the International Contracting Company will be found beginning at page 49.

The attention of the court is called to these two contracts and a careful comparison of the two is requested. It is specifically stated in the complaint in this action (p. 4) that the contract with Perkins & O'Brien was "abrogated and declared null and void" *under authority of that part of the contract specifically marked Exhibit A1;* and found at the top of page 14.

By reference to the fourth paragraph of the International Contracting Company contract, beginning in the middle of page 50, it will be found that this section giving the engineer authority to annul the contract was materially changed from the fourth paragraph of the Perkins & O'Brien contract, found beginning at the top of page 14. The International Dredging Company contract, page 50, *has no forfeiture provision* (see p. 50), but merely requires that the reserved percentages *shall be retained and applied* on the final cost of completion *and that the contractor shall remain liable.* In the Perkins & O'Brien contract it is provided (p. 14 at line 12) that all moneys or reserved percentages due or to become due to the contractor *shall be forfeited* to the United States, *and the contractor is not under any further liability.*

This change releases the surety.

In *American Bonding Company* v. *United States*, 167 Federal Reporter, 910, the court held:

"The Surety Company was nevertheless held discharged from liability. This case is a sufficient answer to the

contention of the United States in the present case, that the change in the contract was not material to the plaintiff-in-error. It is not necessary to review the cases bearing upon this last question. They are numerous, and the law has been authoritatively determined. The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable, and if a change is made in a contract without his consent his liability is at an end, even though it may appear that the change is for his benefit."

A Liquidated Damage Contract.

The Government has heretofore maintained that the Perkins & O'Brien form of contract was a *liquidated damage contract* (but is now trying to repudiate that claim, because the loss is greater than the forfeiture, and alleges that the moneys forfeited are only a penalty). This is shown by reference to the International Dredging Company contract at page 49, where will be found in brackets at the head of that contract, the significant statement that that form of contract is—

"To be used when the specifications DO NOT call for liquidated damages."

Our contention is that whether the forfeiture clause in this Perkins and O'Brien contract is designated as one or the other, that clause *designates the limit of the liability of the contractors*, and that that limit herein is the amount of the reserved percentages at the time of the annulment.

Attorney-General Taney so held in the application of Samuel Grice, 2 Op. Atty.-Gen. 480:

"There is no room for doubt as to the true interpretation of the contract; the words are plain and unambiguous; and the sum in controversy was forfeited to the use and benefit of the United States, upon the failure of Mr. Grice to complete his contract within the time specified."

Also in Starr's case, 9 Opinions Atty.-Gen. 210, it was held:

"This contract does not authorize the final retention of the percentage unless the engineer shall declare a forfeiture. He had a right to do this after the failure of the parties to complete the delivery at the time prescribed and had he done so the contractors would have, undoubtedly, lost the whole of the 10% then reserved."

In *Quinn* v. *United States*, 99 U. S. 30, the court held:

"It seems very doubtful *if, in the event of the termination of his contract under the clause authorizing the engineer to do so*, the contractor is liable to the United States for anything beyond the 10% retained. This 10% is retained, in the language of the contract, until the whole shall be completed. It is retained as security for that end. The work is to be completed by others, and the expense deducted from any money that may *be due him*. He is responsible for damages caused *to others* by the delay. If, therefore, he is responsible *to the United States* beyond the sum due him at the time the contract is taken from him, it is not by the express terms of the contract, but on the general doctrine of damages on failure to fulfill any contract."

In re Mundy & Co. 20 Atty-Gen. Op. 511, 514, Attorney-General Miller says:

"The fund first in order, and perhaps the only one in reach to compensate the United States, is that composed of the reserved moneys under consideration."

And in *Kennedy* v. *United States*, 24 C. Cls. 122, 143, there was no question of the contractor's liability for excess cost involved. There the Court of Claims held: "The court having found that the agreements were properly annulled, consistent with the power and the circumstances, all claim for prospective profits is eliminated from the controversy."

In *Pidgeon* v. *United States*, 27 C. Cls. 167, 176, it is stated: "The ten per cent which by the terms of the agreement it had the right to retain, measures the limits of its power to secure indemnity."

There are forms of government contracts giving the Government the right to excess damages even in the case of an annulment and forfeiture. *That right is specifically stated.*

Such forms will be found in: *Sparhawk* v. *United States*, 134 Fed. Rep. 720; *American Bonding Co.* v. *United States*, 167 Fed. R. 910; The International Contracting Company contract in this case is one. *But the Perkins and O'Brien contract is not such a contract.*

There are government contracts designating how much work shall be done each month.

Such forms will be found in: *United States* v. *Stone Sand & Gravel Co.* 177 Fed. Rep. 321; *American Bonding Co.* v. *United States*, 167 Fed. Rep. 910. *But the Perkins and O'Brien contract is not such a contract.*

What the Government wants the court to say in this case is that the Perkins & O'Brien contract, without such provisions, means the same thing as the contracts containing the provisions.

Cases holding against liquidated damages and declaring the forfeitures to be penalties are:

Kennedy v. *United States*, 24 C. Cls. 122.
Pidgeon v. *United States*, 27 C. Cls. 167.

Cases favoring liquidated damages are:

Sun Printing Assn. v. *Moore*, 183 U. S. 642.
Ellicott Machine Co. v. *United States*, 43 C. Cls. 232.
D'Olier Eng. Co. v. *United States*, 45 C. Cls. 471.

Mr. Wait in his work on "Engineering and Architec-

tural Jurisprudence," gives examples of both kinds of provisions. Sections 713, 714 and 716 gives samples of provisions in a contract such as the Attorney-General would read into the present contract, which expressly provide for annulment of the contract and *completion of the work at the expense of the contractor*. Sections 715, 729 and 730 give samples of clauses similar to the one contained in this case without the liability for excess cost. As to all of them he says, what will be corroborated by an examination of the cases cited both by him and in this brief, Section 718:

"Clauses providing for annulment of the contract by the owner are forfeitures imposed upon the contractor and are not in favor with courts, who construe them most strongly against the owner, company, or city. In fact, the real value of such clauses is very much overestimated as will be seen from what follows. The courts limit the power conferred as narrowly as the language used will permit."

Mr. Hudson, in his book on Building and Engineering Contracts, Third Edition, volume 1, pages 574, 575, refers to the forfeiture clauses in contracts, giving the different stipulations they contain. (See also pages 582, 583, 601, 602, 614, 616, paragraph g).

This court says in *United States* v. *Bethlehem Steel Company*, 205 U. S. 105, 119:

"The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of an amount

stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained."

Other cases favoring liquidated damages are:

Easton v. *Penna. Canal Co.* 13 Ohio, 79;
Faunce v. *Burke*, 16 Pa. St. 469;
Geiger v. *Western Md. R. R.* 41 Md. 4;
Wolf v. *Des Moines Ry. Co.* 64 Ia. 380,
and cases cited.

The Government in its brief claims that, regardless of the annulment, the parties remain "correlatively" interested in the completion of the work. In *Quinn* v. *United States*, 99 U. S. 30, this court stated:

"So, on the other hand, we think it equally clear that when his contract is rightfully terminated, he is entitled to no further rights in regard to its performance by others. The Government does not, by reason of being compelled by his failures to resume control of the work, do so for his benefit but for its own. They do not thus become his agents to do the work for him which he failed to do, and let him reap the profits of the work which he refused or neglected to perform."

Propositions of Law Involved.

The attention of the court is specifically called to the following propositions:

First: The Government "*annulled*" the contract eighteen months before the time allowed for the completion of the contract had expired (pp. 4, 33).

Second: The provision under which it was "*annulled*" (Exhibit A, p. 14), provided the only penalty which the contractor could suffer, namely, the forfeiture of the retained percentages and moneys due.

Third: The United States is seeking to recover the

excess cost of completing the contract not under that provision in the contract set forth in the complaint and designated in Exhibit A1, but under the other and separate provision of the contract (p. 15) which provides for such a recovery only when the contractor fails to complete within the time allowed, and where the contract is not "*annulled.*"

Fourth: This is not an action on an abandoned contract, or even for damages for a breach of contract;—there was no breach by the contractors; and the complaint herein is not based on any breach of contract.

As stated by the court in *American Bonding Company* v. *United States*, 167 F. R. 910:

"This is not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, *but a suit for damages under the express stipulations of the contract, which are set forth in the complaint and made the basis of the action.*"

In *American Bonding Company* v. *Gibson County*, 127 F. R. 671, the court said:

"The distinction sought to be drawn by the plaintiff, *that the suit is not one on the contract, but one for damages on account of the abandonment of the contract, does not appeal to us.*"

Fifth: There is no claim made by the defendants in this case that the annulment of the contract rescinded that contract *ab initio*, as claimed by the District Attorney in the second point of his brief (p. 24). We claim that the annulment *terminated the contract as to the future*, and that this termination took place upon the judgment of the engineer as to whether or not he was satisfied with the progress of the work, and that this judgment was irrespective of any breach by the contractor. The annulment clause was a provision allowing the exercise of the judg-

ment of the engineer, when there was no breach of the contract, *and not upon a breach* as claimed by the Government.

This is conclusively shown in *Phila. R. R. Co.* v. *Howard*, 13 Howard, 307, at 340, where the court states:

"If the defendants annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, * * * they are not liable for any damage the plaintiff may have sustained thereby, *even though he was in no default*, and the company acted in this respect under a mistaken opinion as to his conduct."

We call attention to the fact that in that case the annulment clause contained *the additional clause*, containing the liability of the contractors for excess in cost (p. 340, top).

Sixth: It makes no difference whether the Government claims the forfeiture declared in the annulment clause as liquidated damages or as a penalty, the claim we have made here is that that annulment clause in the contract specifies the limit of liability when an annulment is declared under it, and that the name you give it is immaterial.

Seventh: The Government claims that reference to Section 3709 of the Revised Statutes has in it a hidden meaning; that there should be a continuing interest in the contract by the contactors after the annulment, and that if there was that continuing interest, they must necessarily be liable for any loss on the re-letting. We will show in this brief that such was not the object of the reference to that section. But accepting the Government's contention, for the purpose of this argument, it is still evident that the contractor's alleged continuing liability could not extend beyond the so-called penalty or

moneys retained by the Government under the exact terms of the annulment clause.

Eighth: In sub-division A, Point III, in the Government's brief, it is stated: "*for there was a covenant* on the part of the contractors to prosecute the work with such diligence as should satisfy him."

There is no such covenant in any part of the contract or specifications. All the liability that rests upon the contractors was the danger to them of the forfeiture in case they did not satisfy the engineer with the progress of their work.

Ninth: In sub-division C of Point III of the Government's brief, page 63, it is claimed that there was a breach of the contract by the contractors because of some claimed obstruction to navigation. We refer the court to specification 51, page 11. *There is no covenant in the contract that these contractors will not obstruct navigation.* Specification 51 plainly shows that obstruction is expected, and the contractors are merely instructed to take care to make it "as little as possible." The engineer was not given any power to determine if navigation was obstructed. That would be under the regularly constituted authorities in charge of navigation.

Tenth: The claim that there was a breach of the contract because the contractors did not complete the contract after the Government had annulled it eighteen months before the time for completion, designated in the contract, is too outside any issue in this case to require any argument.

Eleventh: There is in the contract no power in the engineer to determine that contractors would not be able to complete within the time specified in the contract. First; such a thing would not have been possible as the contractors were continuing the work, and the engineer,

has stated that the work could easily have been done in the remaining time. Second; such an act was outside the province of the engineer. He was merely a limited agent for the Government, and by the contract, his powers and duties are specified by the two contracting parties, and that contract does not confer upon him any such right or duty.

Twelfth: The Government's contention of the meaning of the reference to Section 3709 of the Revised Statutes in the annulment clause becomes valueless, because after the contract was annulled *the work was not done privately* under the reference to that Statute, but the work was re-advertised.

Thirteenth: While reference may be made to numerous reported cases, each action must stand on its own peculiar facts, and while principles of law may be evolved by those references, it is improper to treat decisions upon dissimilar facts as controlling here.

Point I.

A CONTRACT OF SURETYSHIP IS TO BE CONSTRUED SO AS TO GIVE EFFECT TO THE INTENTION OF THE PARTIES AND WHEN SO CONSTRUED THE OBLIGATION OF THE PARTIES IS STRICTISSIMI JURIS.

This principle has been laid down in the following cases:

United States v. *Freel*, 186 U. S. 309, and 92 F. R. 299 below.
Miller v. *Steward*, 9 Wheaton, 680, 701.
Reese v. *United States*, 9 Wall. 13, 21.
City of New York v. *Clark*, 84 App. Div. 385.
People v. *Backus*, 117 N. Y. 196.
Page v. *Krekley*, 137 N. Y. 307.
John Hancock Mutual Life Ins. Co. v. *Lowenberg*, 120 N. Y. 44.
Brant on Suretyship and Guaranty, 2d Ed. p. 388.

Amer. Bonding. Co. v. *United States*, 167 Fed. R. 910.

Judge Earle, in *People* v. *Backus* (*supra*), said:

"In ascertaining that intention we are to read the language used by the parties in the light of the circumstances surrounding the execution of the instrument, and when we have thus ascertained the meaning we are to give it effect. But when the meaning of the language has been thus ascertained the responsibility of the surety is not to be extended or enlarged by implication or construction, and it's *strictissimi juris*."

In *Hoffman* v. *Aetna Fire Insurance Company*, 32 N. Y. 405, at 412, three rules of construction are laid down:

"It is a rule of law, as well as of ethics, that where the language of the promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee * * *.

"It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument, and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, everything being equal, that construction should be established which is most beneficial to the promisee * * *.

"The appellants also encountered another rule equally at variance with the proposition they seek to maintain: 'conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.'"

Another rule of construction of contracts as given in the Am. & Eng. Encyc. of Law, Sec. Ed., Vol. 17, page 14, is:

"The words of the document will, in case of doubt, be construed most strongly against the party using them, or as it is sometimes expressed, *fortius contra proferentem*."

This rule has been frequently applied in the case of contracts.

Chambers v. *United States*, 24 C. Cls. 387.
Simpson v. *United States*, 31 C. Cls. 217.
Supreme Counsel v. *Fidelity Co.* 63 Fed. Rep. 48.
Davis Co. v. *James*, 66 Fed. Rep. 124.
Fisk v. *Williams*, 4 App. Div. (N. Y), 491.

In the *Fisk* case above the court at page 491 says:

"It is a well-settled canon for the construction of instruments executed by parties that full force and significance shall be given all of the language used by them, and that if two constructions are possible to an instrument one of which does not give significance to all the words used, and another one can be given to the instrument which will give force and effect to all the words found in the instrument, the latter is to be preferred and adopted."

Suit Based on Annulment, not Breach.

There are two provisions of the Perkins & O'Brien contract guaranteed by this defendant which require construction by this court. First, the provision under which the Government acted in annulling the contract (p. 14). Second, the other and separate provision providing the penalty which the contractor was to suffer when the contract was continued to the end of the time designated therein, and had not yet been completed (p. 15). THE GOVERNMENT ACTED UNDER THE FIRST PROVISION, AS IT SPECIFICALLY STATES IN ITS COMPLAINT (p. 4), and annulled the contract eighteen months before it was required to be completed; but now seeks to recover from the contractors the same rights and damages which it would have been entitled to under the second separate provision of the contract (p. 15) if it had allowed Perkins & O'Brien to carry on the contract up to the date fixed therein and had thereafter completed the work itself.

In *Philadelphia Railroad* v. *Howard*, 13 Howard, 307, this court said:

"We do not deem it needful to review the numerous authorities, because we hold the general principle to be clear that covenants are to be considered dependent or independent, according to the intention of the parties, which is to be deduced from the whole instrument, and in this case we find no difficulty in arriving at the conclusion, that the covenants are throughout independent. There are in this instrument, no terms which import a condition, or expressly make one of these covenants in any particular dependent on the other."

This contract was drawn by the United States (see p. 8, which is Paragraph 25 of the specifications). The contractor is notified that the contract is the one adopted by the Engineer Department of the Government, and the United States was the one for whose benefit the forfeiture was introduced, and according to the rules laid down by the above cases, it must be construed most strongly against the United States.

In the case of *Dwight* v. *Germania Life Insurance Co.* 103 N. Y. 346, the rule is laid down that parties may make any conditions they may see fit and that the court may not arbitrarily disregard those conditions.

See also—

United States v. *Bethlehem Steel Co.* 205 U. S. 105, 119, and
D'Olier Eng. Co. v. *United States*, 45 C. Cls. 471.

And in the case of *Union Pacific Tea Co.* v. *Union Surety Co.* 44 N. Y. Misc. at page 52, Judge Gildersleeve held:

"*That as the contract was drawn by the plaintiff, it must be interpreted as to doubtful provisions in favor of the defendant.*"

(See also opinion of Judge Lacombe, p. 79.)

The first provision is one which grants a privilege to the Government of putting an end to the contract, without any liability against it, at any time prior to the time for completing has expired; and distinctly and in clear terms provides the penalty which the contractor must suffer in that case. This section is complete in itself. It provides when, for what, and how it may be annulled, and the penalty if it is annulled.

The penalty is the forfeiture to the Government of the retained percentages due and to grow due the contractor. As the Government drew the contract, it could have provided for another penalty and other damages had it desired to, but it did not do this, and must therefore abide by the terms of its contract. That the Government knew the difference between the forfeiture of this penalty and the holding of the contractor liable for the excess cost is shown very distinctly by reference to the new contract made with the International Contracting Company (par. 4, Record, p. 50). There the forfeiture of the retained percentages is entirely omitted and the Government is given the same right to annul the contract.

Again, the Dredging Company contract provides that the retained percentages were merely retained until the work was finally completed by the Government and that in case the cost of completing is greater than the amount of the first contract, that these retained percentages shall be used on account of any excess cost, expressly stating the contractor to be liable for any balance. In the second contract there is no forfeiture, and if the excess cost was less than the amount of the retained percentages, the contractor would be entitled to the difference.

But in the Perkins & O'Brien contract this provision allowing the engineer to annul the contract and absolutely forfeiting the retained percentages is severe, in that it

does not give the contractor any opportunity to complete the contract and he loses the retained moneys for work actually done. In the present case it is admitted that the contractor entered upon the performance of the work (4th paragraph, complaint, p. 4). It is also admitted that the contract was annulled because the work was not progressing fast enough to suit the inspector AND FOR NO OTHER REASON. This is shown in the letters at pages 30 and 33. At page 59, the engineer states "so that when I annulled the contract it was not annulled because of lack of time in which to complete it. There was fully sufficient time left for these men to complete the contract if they could get the plant. My judgment was that these men could not control sufficient plant to complete what remained to be done under the contract in the remaining time." Also at page 59, the engineer states, "the amount of dredging required to complete this contract was considerably less than I anticipated at the time. It turned out that instead of having a million and a half cubic yards to dredge, there was only one million three hundred thousand. And from my experience from dredging, it was a very possible thing, easily accomplished, for any one to have completed that contract within eighteen months, if they had the plant. That is a very essential element." Also at page 41, the engineer states, "I came to the conclusion it was better to have the contract annulled and get the work done in some other way than allow it to drift along for eighteen months and then have to resort to another contract."

In other words, he considered it was better for the Government to stop the work eighteen months before the time to complete, under the one clause of the contract, than to wait till the time for completion and hold the contractors for the excess cost of completion, under the other clause of the contract.

There is, therefore, no dispute that the contract could have been completed in the contract time, but the contractor was not allowed to complete. His contract was annulled. This part of the Perkins & O'Brien contract under which the Government (Exhibit A1) acted (p. 14), means what it says, which is: that if the contractor fails to prosecute the work to the satisfaction of the engineer the Government may then annul the contract and the contractor will forfeit to the Government all percentages due or to grow due. It says nothing about the contractor paying for the excess cost of completing the contract. The Government takes the chance when it acts solely under this provision of having enough money remaining unpaid in the retained percentages to do the work. On the other hand, it gains the advantage, at any time it is not satisfied with the progress of the work, of taking up the work itself and carrying it on as it sees fit, without liability or interference.

Now the new contract made with the International Contracting Company is entirely different. The forfeiture of the retained percentages is wiped out and the contractor is held liable for any excess cost in completing the work, but at the same time still retained a right to recover from the Government whatever part of the retained moneys and percentages may not be required to complete the contract. He does not lose his right in those retained moneys and percentages, even though he is not allowed to complete the contract.

But the provision of the Perkins & O'Brien contract (p. 15), in regard to a failure to complete, we submit, had no reference to the situation of affairs in the present controversy. *That is a provision of the contract which did not and could not have become operative until the total time mentioned in the contract to complete had expired, or the contract had been abandoned.* There is no claim in

this case of any abandonment of this contract. At page 66 the court specifically states that it will be understood that Perkins & O'Brien did not quit until they were to be put off. And at page 33, the engineer, Goethals, states that Perkins & O'Brien continued work upon the contract, *dredging up to the last day.* Neither is there any breach of contract here. As Judge Lacombe says (page 79):

"It can hardly be said that he has broken the contract just because he has been so slothful during the first half of the period allowed him that he will have to be very much more diligent during the remainder of the period in order to fully complete the work on time."

and in *Pidgeon* v. *United States*, 27 C. Cls. 167, the court said:

"Whatever might have been his faults up to that time, the Government having permitted him to proceed, having accepted the performance of the contract during the month of September, and having received the benefit of his labor during that period, it was not in its power to withhold the pay in order that it might be secured against the consequence of a probable or possible failure."

Several pages of the Government's brief are used to refer to the efforts of the engineer to have done a greater amount of work, but those former controversies are not important here.

As the court said in the *Pidgeon* case:

"The law requires the right of forfeiture to be exercised in strict pursuance of the power and in apt time. It can not be founded upon a fault, once forgiven, and upon the faith of which forgiveness, the derelict party has ventured forward in the performance of his duty."

And as a matter of fact the dissatisfaction of the engi-

neer with the past work, was not made the test for the annulment of this contract at all.

The ground on which the annulment was made *was the failure of the contractors to have on the work at a certain time the amount of plant he demanded for future work.*

This is shown by his report to the Chief of Engineers (page 38):

"and I have the honor to recommend that I may be authorized to notify the contractors that unless the plant be increased sufficiently to remove monthly the amount to complete the work under the terms of the contract, that, with the approval of the Chief of Engineers, the contract will be annulled on January 1, 1900."

Also by indorsement of Chief of Engineers (page 39):

"Respectfully returned to Major Goethals, who is authorized to proceed *as recommended* in the 4th indorsement hereon."

Also by engineer's notification to the contractors and sureties in his letter of December 4, 1900 (page 31):

"Under authority of the Chief of Engineers, U. S. A., I am authorized to inform you that *unless* the contractors have on work by January 1st, 1901, *a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled.*"

And when the contractors did not provide the additional plant in the time designated, and basing his action upon that failure to so satisfy him, he wrote his notification of December 31, 1900 (page 33).

No breach stated or claimed. Merely a failure to satisfy his judgment. It appears from these records that the annulment was not based even on past displeasures, but on a non-compliance by the contractors, with a demand for future work in a stated amount in a specified time.

Such power is nowhere given to the engineer.

The references in the Government's brief to past controversies, on the ground that they show former lack of diligence by the contractors, are not in point. They merely show that the contractors were not satisfying the engineer. But he did not annul the contract at any of the former times he claims the contractors were not working, or declare the work abandoned.

And therefore, as stated in the Pidgeon *case, they were not afterwards grounds for an annulment and forfeiture.*

Government's Authorities Examined.

We suggest to the court that the numerous authorities cited in the Government's brief dealing with the liability of contractors after they have broken their contract, are for the purpose of clouding the real issue.

Such cases are *McElwee* v. *Bridgeport Land Co.* 56 Fed. Rep. 627, where there was no provision for annulment and the consequence thereof as in the present case.

The cases of *Kihlberg*, 97 U. S. 398; *Sweeney*, 109 U. S. 618; and *Gleason*, 175 U. S. 588; are merely cases of the ordinary provision in contracts giving the engineer power to certify as to quantities, values, distances, etc. to extend time, or to do other acts—general questions in no wise involved in this case.

In the *Electrozone* case, namely, *Vickers* v. *Electrozone Company*, 67 N. J. L. 665, the defendants were to purchase a certain number of gross per year and they made a breach of their contract by not purchasing the first year. Suit was brought for damages *on the breach* and the defendants demurred; the court said:

"What is there in the fifth clause that can be properly construed as evincing an intention of the vendors to resort to it as their exclusive remedy for default of the vendees or to surrender or waive the benefits to themselves (the

vendors) of the prior covenants for the purchase of the goods and the payment of money to them? That clause in substance, provides that if the second parties (vendees) shall fail to order and purchase from the first party (vendors) and pay them during said period, the stipulated quantity of the compounds, that the agreement shall thereupon *ipso facto*, and without the necessity of any action by the vendors become void. But with what consequences? The consequences are, in the same sentence, expressed to be that all rights and interests thereunder of the vendees (not the vendors) shall be immediately forfeited. It is to be especially observed that the language of this clause does not reach or affect either the rights of the vendors or the liabilities of the vendees under this agreement.

As we have heretofore stated, in the case now before the court, we are not dealing with a broken contract or with a cause of action brought for breach of contract, but with a claim made under a right of annulment, without any breach, but simply upon the judgment of the engineer.

And in *Jackson* v. *Cleveland*, quoted at page 38 of the Government's brief, to the effect that damages were held recoverable after an annulment, we call the court's attention to the fact that the clause quoted specifically provided that the party of the second part might employ help to do the work *and charge the expense thereof to the party of the first part;* OR the engineer might determine that the contract had been abandoned by the party of the first part, in which event, the agreement on the part of the party of the second part shall be null and void. In other words, there was the alternative right on the part of the party of the second part to do the work for the benefit of the party of the first part, OR to annul the contract and go ahead with the work regardless of the party of the first part entirely. The case is therefore not applicable.

Langdon v. *Northfield*, 42 Minn. 400, quoted at page 39 of the Government's brief, had a provision in the clause allowing a termination of the contract, that the plaintiff might have the alternative right of doing the work at the expense of the contractors. The court said: "The only question presented by the record on this appeal is the correctness of the construction placed by the trial judge upon the last clause of this provision."

And in reading the cases submitted by the Government in its brief, it will be necessary for the court to distinguish the exact terms and condition of the clauses in each of the contracts referred to in those authorities to ascertain, as it will, whether the clauses did not either give an alternative right, or had in them an additional term continuing the liability of the contractors even after an annulment.

The second provision of the Perkins & O'Brien contract refers to a case where the contractor has been allowed the full period in which to complete the work, but has failed to do so. The contract has come to an end according to its terms, without the special action or intervention of the Government. This provision also is complete in itself and provides the penalty which the contractor must suffer if he does not complete in the time allowed and according to its terms. Each of these provisions are absolutely distinct, complete and "independent," as said in *Philadelphia R. R.* v. *Howard*, *supra*. In the latter provision the penalty included the previous penalty of forfeiture of the retained percentages, and also the extra penalty (p. 15) of paying to the Government all damages due to such failure in excess of the sum so forfeited and also the amount expended by the Government in completing the contract in excess of the price named in the contract. In this provision the contract is not "annulled," but the right of the Government for damages arises under

the very terms of the contract and by reason of that provision. This penalty was made more severe in the second case, because the contractor had the full time in which to complete, whereas in the first case, the contractor is not only not given the full time to complete, but his contract is taken away, and he has no further opportunity to complete the work and make his profit. If all the penalties in the second provision had been intended to apply when the Government acted under the first provision, those different penalties would have been included in that first provision. That this is so is also more clearly shown by again referring to the new contract with the International Contracting Company. That contract also has the two distinct provisions for annulment during the carrying on of the work (p. 50), and for damages for failure to complete within the time (p. 51). And it will be found in *both* of these provisions in the new contract the forfeiture was omitted, *and that also in BOTH provisions the right of the Government to recover THE EXCESS COST is distinctly stated.* But in our contract, any excess cost was not stated in the first provision. Only one penalty of forfeiture is attached to that first provision. The fact that that one penalty is included in the first provision shows the intention more strongly than if no penalty had been included, because it is not reasonable to suppose that the Government put in one penalty and then referred to other penalties by inference. If an additional penalty had any reference to that first provision, how few words would have added it beyond dispute.

Then the position of the two penalties in the contract shows they have no reference. The second provision is removed from the first by four paragraphs. The first refers only to an annulment of the contract, that is where the contract and all its terms are brought to an

end. *The second provision has nothing to do with annulment.* It is a provision referring to a different state of affairs; that is when the time has run and the work is not done, or the contractor has thrown up the job. It is a provision which could not become operative until the end of the time of the contract or its abandonment. The other is a term of the contract which could be made operative any time after the first day the contractor had begun work that the engineer saw fit to act. But you can not annul a contract and yet go on working under it.

These two clauses relate to two entirely different conditions, and different penalties have been provided in each case. The penalty provided for not completing in the contract time can not be applied in case of annulment, and vice versa.

Had the Government intended to collect the excess cost of completing the contract from the contractor in the case where it annulled the contract, it should have provided for such a contingency in the contract. But it did not do so. This clause of the contract provides for a forfeiture and consequently must be construed most strongly against the party for whose benefit it is, that is, the Government (see *Hoffman* v. *Aetna Life Ins. Co. ante*, p. 19). This is especially true as a recovery is sought against the Surety Company, in which case the rule is as laid down in *United States* v. *McIntyre*, 111 Fed. Rep. 590, at 597, where the court says:

"He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however iron-bound it may be; for there is for the surety in the enforcement of the bond no equity nor latitude beyond its strict terms."

If the rule laid down in *Fisk* v. *Williams*, 4 App. Div. (N. Y.) 491:

"That if two constructions are possible, to an instrument, one of which does not give significance to all the words used, and another can be given to the instrument which will give force and effect to all the words found in the instrument, the latter construction is to be preferred and adopted."

means anything in this case, it means that if the Government annuls the contract according to that provision of the contract which relates to annulment, the contractor forfeits all the moneys or retained percentages, and nothing else.

Judge Hazel, in his opinion upon the demurrer, 143 Fed. Rep. 688, erroneously blends these two provisions of the Perkins & O'Brien contract and refuses to be handicapped by the separate clauses relating to the forfeiture of the percentages and the recovering of compensatory damages; and makes for the contractors a new contract. He says:

"I am unable to subscribe to the soundness of this contention as defendant will be entitled to be credited with the amount forfeited when the full measure of damage is ascertained."

We would ask the Government to point out one word in the Perkins & O'Brien contract giving credit to Perkins & O'Brien for the amount of retained percentages in case of the annulment of the contract.

The Government, not satisfied with the combination worked out by Judge Hazel, now ingeniously brings forward a new combination hidden away in a mere reference to a section of the Revised Statutes; which never became operative, because the work was re-advertised and not let by open or private contract, and claims that this reference to Section 3709 has hidden in it a power to change the meaning of the words used in the prior part of the forfeiture clause, from their ordinary or

natural use; so that with this reference to Section 3709, "to forfeit" means merely "to retain"; "annul" means merely to declare a contract broken by the other party while retaining all rights thereunder. That "to rescind" is the peculiar and only word that means the termination of a contract, and that the non-use of that word was intended to and does have hidden in it a continuation of liability every bit as much as though the contract had not been annulled.

We first had the anomalous situation of the Government relying on Judge Hazel's decision overruling the demurrer and authorizing it to recover in this action, and at the same time repudiating the ground upon which Judge Hazel bases his opinion, namely, that there was no forfeiture, but merely a retention of reserved percentages to be finally credited on the excess cost to complete. On the second trial the Government attempted to credit the contractors with the retained moneys, *because it had turned out that the loss was more than those retained moneys*, yet in the complaint in this action it does not give any such credit.

It is only by making this annulment paragraph in the Perkins & O'Brien contract complete in itself that we can give a meaning to that paragraph, and also an intelligible construction to the paragraph relating to the failure of the contractor to complete within the time allowed by the contract.

Point II.

IN ANNULLING THE CONTRACT, THE GOVERNMENT PUT AN END TO IT, AS TO THE FUTURE, BETWEEN THE PARTIES AND NOTHING CAN BE RECOVERED UNDER THE CONTRACT, AS NO SPECIAL PROVISION IN REGARD TO THAT RECOVERY WAS MADE IN THE CONTRACT.

The contract of Perkins & O'Brien was annulled by

the United States on December 31, 1900, in accordance with a special term of the contract (Exhibit A1, fol. 8). The letter of annulment (fol. 60) is as follows:

"As the work under your contract for dredging in the Providence River and Narragansett Bay has not, in my judgment, been prosecuted faithfully and diligently, by authority of the Chief of Engineers of the United States Army, and with his sanction, I have to inform you that the contract *is hereby annulled.*"

This letter was addressed to both the Surety Company and the contractors. It says "is hereby annulled," but does not say that the United States will look to either the surety or the contractors for any damages it may suffer if the cost of completing is more than the contract price and reserved percentages. The letter clearly shows that the Government intended to annul the contract and that it understood that it could not collect damages. The Government shows by this letter how it interprets the contract. This is further shown in the letter of Engineer Goethals to Brigadier-General Wilson (fol. 62) wherein he recommends that the contract "be annulled."

Also in the second indorsement of General Wilson (p. 37) where the Chief Engineer is authorized "to annul" the contract of Perkins & O'Brien by giving formal notice in writing of that fact to the contractors and their surety. Also in the indorsement from Major Goethals (p. 38) wherein he asks that he may be authorized to notify the contractors that the contract "will be annulled."

We have here clearly and distinctly set forth that the annulment was solely on the ground that the work was not being prosecuted to the satisfaction of the engineer, and the exercise by the engineer of his judgment in connection therewith. At p. 41 he says:

"I came to the conclusion it was better to have the con-

tract annulled and get the work done in some other way, than to allow it to drift along for eighteen months and then have to resort to another contract."

The complaint (p. 4) is as follows:

"That the said contract *was abrogated* and declared null and void under that part of Exhibit A *more particularly marked and designated Exhibit A1.*"

The Century Dictionary defines annul as "to reduce to nothing, to obliterate, *to abrogate*, to do away with." Thus, when a contract is annulled it becomes null and void from that time on, which in the present case is from December 31, 1900. The complaint and this definition agree in all respects.

This is further borne out by reference to the letter of Secretary of War Root (pp. 59, 60), in which he states that Major Goethals has "formally annulled the contract in question for failure of the contractors to faithfully and diligently prosecute the work as required by the terms of the agreement."

But the Government takes the double position that it can annul the contract and also recover damages from the contractors for their failure to perform. They forget the old story that you can not eat your loaf and have it too. They seek to recover damages from the contractor and the surety when they have put it out of the power of the contractor to perform. An action for damages on an abrogated or annulled contract will not lie. That the Government can not recover damages in this case is shown by the following authorities:

In *Hubbardston* v. *Bates*, 31 Mich. 158, the court at page 168, says:

"The court very properly held (and such is obviously the law) that plaintiffs can not rescind the contract and

then insist on damages for not performing, for when the contract is rescinded an action will not lie for a breach of it."

Also in *Van Trott* v. *Weise*, 36 Wis. 439, at page 448, the court says:

"He can not hold to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto* if at all."

Judge Taft, who wrote the opinion in *Hayes* v. *City of Nashville*, 80 Fed. Rep. 641, in which opinion the question of annulment is taken up at great detail, says:

"It was first contended on behalf of the plaintiffs in error that the city could not claim damages for breach of the contract, by way of a set-off, because its action in annulling the contract was a complete rescission of it, releasing each party from every obligation under it, as if there had never been a contract made. It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which it was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract."

In both the Hayes and Hubbardston decisions the court found that *because there was some special provision in the contracts reserving a right to damages after the annulment or because the parties serving the notice of annulment had stated in those notices that they intended to look to the contractors for damages*, that the parties making up the notices had incorrectly used the terms of annulment, *whereas their intention was clearly shown to merely declare the contract abandoned*, and the court relieved them from the effects of the alleged misuse of language.

In these and similar cases, where breaches have admittedly occurred, the court has attempted to relieve the innocent parties from the consequences of the misuse by them of erroneous language.

In the present case there is no opportunity for the exercise by the court of such judicial discretion or leniency. Neither the contract nor the notice of annulment made any reservation. And as heretofore shown, there is no question of breach or abandonment in this case.

The Government now claims that the reference to Section 3709 of the Revised Statutes is such a reservation, and cites in its brief the cases we have here used for the purpose of showing a principle of law. We have heretofore shown that this attempted use of the reference to Section 3709 is error.

Effect of an Annulment.

THE ANNULMENT OF THE CONTRACT DOES NOT RENDER THE CONTRACT VOID AB INITIO, but simply releases all parties as to the future. In the case of *Sparhawk* v. *United States*, 134 Fed. Rep. 720, the court said:

"Nor can we accept the suggestion that if the contract had been annulled for cause, the bankrupt was not entitled to notice. If the contract was annulled the annulment released both parties *as to the future*."

And in *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. at 340, the question of the interpretation of a contract is considered. The court said:

"Another interpretation is that the contract as far as it remained executory on the part of the contractor and all obligations of the company dependent *on the future execution by him* of any part of the contract might be annulled. We can not hesitate to fix on the latter as the true interpretation."

The principles of law to be evolved from these authorities is that a party who annuls a contract can not recover damages or a penalty from the other party, unless they

are referred to in the notice of annulment, or unless there is a special agreement to that effect in the contract. This rule was laid down in *McCreery* v. *Day*, 119 N. Y. 5, by Judge Andrews who said:

"Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission (Leake on Contracts, 788, and cases cited)."

And in the case of *Mayor, etc.* v. *N. Y. Refrigerator Construction Co.* 146 N. Y. 210 at page 214:

"It is further urged that the contract has been cancelled and annulled by the parties, and that an action can not be founded thereon. We have been referred to numerous authorities laying down the general doctrine that where a contract is rescinded while in the course of performance no claim in respect of performance or of what has been paid or received thereon may thereafter be made. This general rule is subject, however, to the qualification that any claim founded on the contract must be referred to the agreement of rescission, to ascertain whether it has expressly or impliedly reserved."

This statement was quoted with approval by Judge Taft in his opinion in the *Hayes* case above.

In *Pidgeon* v. *United States*, 27 C. Cls. 167, it is held:

"The law requires the right of forfeiture to be exercised in strict pursuance of the power and in apt time."

Following the principle referred to, an examination of several of the authorities cited by our opponents, shows they are not applicable here on their separate state of facts.

In the case of *Sparhawk* v. *United States*, 134 Fed. Rep.

720, the clause of the contract providing for an annulment contained the following special provision as regards damages:

"And it is expressly agreed by the said party of the second part that the damage on said contract as aforesaid, or anything done by the Postmaster General in pursuance of this stipulation shall not affect or impair any right or claim of the United States to indebtedness or damages for the breach of any of the covenants of the contract by the party of the second part."

And the court, in its opinion, said:

"*By the terms of the contract* the right was reserved *notwithstanding an annulment of the contract* by the Postmaster General, and of course the subsequent petition and adjudication in bankruptcy could not defeat and did not impair the fixed right of the United States."

In *American Bonding Co.* v. *U. S.* 167 Fed. Rep. 910, the annulment clause contained an additional proviso that nevertheless the Government should have the right to recover for excess cost.

These cases show us clearly that the United States understands that it can recover the excess cost of completing a contract which it has annulled only when it makes that provision in the agreement for annulment. If the Government had intended to recover anything more than the forfeiture of the retained percentages, when it annulled the contract here in question, it would have made provision for it the same as in the *Sparhawk* case, and other cases.

And this is shown very clearly by reference to the provision for annulment in the new contract made with the International Contracting Company for this same work (p. 49). As we have stated before, the Government clearly and distinctly substitutes a retention of the reserved per-

centages in place of the forfeiture in case of the annulment, and that appears in the following language (p. 50):

"And the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same and also all costs of inspection and superintendence incurred by the said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the first part."

This new contract clearly shows that the Government understood that in order to recover beyond the amount forfeited that it must so designate in the contract itself.

The Government attorneys have referred to the case of the *Anvil Mining Company* v. *Humble*, 153 Fed. Rep. 540, at page 541, as an authority in their favor. But there again it will be found that the contract contained a clause that one of the parties thereto had the power of annulment at any time that he should decide a system of mining was prejudicial, and then we find this clause: "Equitable compensation to be made said party of the first part for damage suffered by them by reason of the said party of the second part so terminating this contract." We submit that that case has no reference to the present litigation.

Briefly, then, the law is that when a contract is annulled all parties are released from the contract as to the future. That the party who annuls can not recover damages for non-performance unless that right is specially reserved in the agreement for annulment, and then he can recover only what is reserved to him.

Applying these principles to the case now before the court, we find that the Government annulled the contract

upon that drastic provision allowing it to do so. That this provision provided how that annulment was to be made. That the conditions there described were complied with. That the annulment clause contained a provision that upon the annulment the contractor should forfeit the retained percentages to the Government. That the Government has taken this forfeiture and still retains it and upon the first trial refused to give the contractor any credit therefor, showing its position clearly. That the contract contained no provision as to damages for not completing the contract in case of annulment. That the new contract with the International Contracting Company, which states at its head that it is a contract to be used when the specifications DO NOT call for liquidated damages, has in it a specific clause giving the right to the Government to collect damages. And the Government even in its notice of annulment made no claim that any rights against the contractors or sureties were reserved. It merely stated that the contract "is hereby annulled." Such being the case, the Government can not maintain this cause of action. As the Government has no cause of action against the contractors for damages it can not have one as against the surety.

Annulment not an Ascertainment of Breach.

Throughout the brief for the United States runs the assumption that the annulment was founded upon a breach of the contract and that this breach was authoritatively ascertained by an arbitrator named in the contract. This extremely forced and artificial construction of a plain provision in the contract has no support in authority. The power of forfeiture is a common and well understood feature of building contracts. Thus *Hudson*, Building and Engineering Contracts, Vol. I, says under the head of "Forfeiture," p. 574:

"A forfeiture clause is intended to give an employer, or some other person named in the clause, the power, upon the occurrence of certain events, to deprive the builder of the right to finish the work he has contracted to perform, and to seize the loose materials, and sometimes the plant as well, for the purpose of using or using them up in the completion of the work."

Under the heading "Subjects of Forfeiture," pp. 574, 575, he says:

"Forfeiture clause may confer some of the following rights, viz.:

"To take possession of the work already done or to seize the materials, or both;

"To retain moneys due to the contractor for work already done at the time of seizure;

"To complete the contract or to employ or contract with some other person to complete the contract;

"To use or use up the materials and plant to complete the work;

"To sell after user the surplus materials to recoup loss;

"To payment from the contractor for any loss sustained in completing;

"To the property in materials on the site not built into the work;

"To the property in the plant, scaffolding, and machinery."

The first three of the rights here mentioned are given to the engineer of the Government by this contract. The forfeiture clause, however, fails to contain any provision granting the Government the right "to payment from the contractor for any loss sustained in completing." The law will not imply such a right. The contract being silent on the subject, the right does not exist.

So, too, *Macassey & Strahan* in their able little work entitled "The Law Relating to Civil Engineers, Architects and Contractors," say, pp. 248, 249:

"Power to Determine.—A very usual clause in build-

ing contracts is that under which the employer may put an end to the contract in the event of the contractor making certain defaults. Thus, it is frequently provided that if the contractor proceeds with the works at such a rate that it becomes evident he can not finish them within the time of completion, the employer may enter and seize the plant and materials, and take possession of the works and determine the contract. In a similar way, if the contractor executes the works, or any portion of them, in a manner contrary to the terms of the contract, the employer may enter and determine the contract. Provision is made in all cases that due notice of the employer's intention to exercise his power under the contract should be given to the contractor, and the tenor and time of service of this notice are often matters of considerable importance.

"There are not many cases in the reports where this power to determine the contract by the employer has come before the courts; but in most of the cases which have occurred the result has generally been in the contractor's favor."

Here we find the common-sense rule applied of treating a contract as meaning just what it says, when it provides for a forfeiture at the option of the building owner or his engineer under certain contingencies and with certain results specified in the contract. No construction will be given to such powers which will carry them beyond what has been expressly stipulated.

Mr. *John C. Wait*, a well known American writer, says in his book "Engineering and Architectural Jurisprudence," Section 720:

"While agreements that a contract shall upon certain conditions become inoperative and not binding have been sustained, a contract that one party can in his discretion or for certain causes, of which he himself shall be sole judge, terminate or annul a contract, would seem to be unreasonable and against public policy. Such a contract presents the one-sided spectacle of one party being bound

to perform his undertakings, while the other may perform or not, at his pleasure."

He adds, however, that such agreement is valid and and binding. After quoting a clause similar to the one here involved, says:

"Such an agreement has been held a covenant on the part of the contractor, and gives the owner or company the power, upon the certificate being made, to put an end to the contract, and without being liable for damages resulting."

In all of these works ample citations of cases occur. Together, they show that these clauses for forfeiture, though valid, are not to be pressed beyond their exact meaning. Far from giving the owner or his engineer any power authoritatively to declare that the contract has been broken by a contractor, they constitute rather the exercise of specific power to annul the contract at discretion. Both the limits of this discretion and the consequences declared by the contract as those which are to ensue upon its exercise must be strictly observed. The owner can gain nothing by intendment and construction. The view taken by these authorities is fatal to the doctrine of "implied covenants" which runs through the brief for the United States.

Point III.

Reference to Revised Statutes, § 3709.

The Government contends, from page 64 to 84 of its brief, that the reference to Section 3709 of the Revised Statutes at the end of the forfeiture clause shows "conclusively" that the prior words of the clause do not mean what they say, and that it was really intended that the contractors should remain liable for all excess cost of com-

pletion, even after the annulment had in conformity with the strict terms of the prior part of that clause.

Section 3709 of the Revised Statutes is a general law directing the advertising of contracts for supplies and services—

"when the public exigencies do not require the immediate delivery of the articles or performance of the service."

Then there is this exception—

"when immediate delivery or performance is required by the public exigency, the articles required may be procured by open purchase or contract."

If we refer back to the forfeiture clause in the Perkins & O'Brien contract, we find that it specifically states that after the engineer has brought into effect the annulment provided in the clause, that he has power, if he considers that the "public exigency" requires "an immediate performance of the work," to proceed *under the exception* in Section 3709.

It follows therefore that the reference to Section 3709 in the Perkins & O'Brien contract has nothing to do with the general provisions of the law, but merely with the exception specified in that law.

As a matter of fact, we find that after the engineer annulled the Perkins & O'Brien contract he did not determine that the public exigency required the work to be done by open contract, and thereupon and thereafter he regularly readvertised the work, the same as he would have done originally or for any new work.

So that reference to Section 3709 was never acted upon, and necessarily that part of the contract became a dead clause and inoperative. As far as any action actually taken by the Government after the annulment of the contract, this clause need never have been in the contract.

But pages of the Government's brief have been taken up with an attempt, to work out of this reference to the exception in a general statute, a continuing liability on the part of the contractors, contrary to the prior plain language of the clause. Judge Ward in his dissenting opinion said:

"Unless the contractors were to be liable for the loss, if any, of re-letting, I do not see why the statute was referred to."

This misconception of the reference to that section of the Revised Statute is extraordinary.

In case of an annulled contract, the contract would be at an end, as to the future, and there would be no authority for the Treasury Department or disbursing officers of the Government to continue to pay out moneys *on the work* covered by that contract until the work had been re-advertised.

Therefore, *if the public exigency required the work* to be done quickly and without waiting for the formality of a new regularly made contract on which the disbursing officers of the Government could make payments, it was necessary to bring *the work* covered by the annulled contract under some provision of law outside of the contract, in order to give the disbursing officers this power, and hence in the annulment clause *only*, and not in the other clause at the end of the contract for failure to complete, was written a provision to cover the quick completion of the work when necessary in the event of the annulment.

But as we have shown, this reference became a dead letter because the public exigency did not require an open contract under the exception in that Section, and the Government made a new contract regularly, just the same as though the Perkins & O'Brien contract never had been in existence.

The cases claiming the forfeiture provided for in this annulment clause as liquidated damages on one side, and a penalty on the other, we have heretofore discussed.

No Covenant to do any Portion in Stated Time.

From page 30 to 47 of the Government's brief, there occurs what we may be excused from designating as a backhanded argument. The attorneys are attempting to argue a negative.

While admitting that the contract had no provision requiring the contractors "to do any stated portion of the work in any stated time," several clauses of the contract are referred to to show that it was the spirit of the contract that the contractors should work practically continuously.

The difficulty with the contract was that there was no clause designating how much should be done at any one time, and no power giving any one authority to designate any specified work for any specified time. Also no one has ever contended that if the contractors abandoned the work, the Government could not, during that time, have stepped in and taken possession because of that abandonment and breach.

But again, the difficulty is that there was no abandonment and no such action was ever taken. And this action was not brought on an abandoned contract, or on a broken contract. And as the Court of Claims stated in the *Pidgeon* case, 27 C. Cls. 175:

"The law requires the right of forfeiture to be exercised in strict pursuance of the power and in apt time. It can not be founded upon a fault once forgiven, and upon the faith of which forgiveness the derelict party has ventured forward in the performance of his duty."

The contract was annulled while the contractors were actually working in full compliance with its terms. And then because they had failed to comply with the outside demand of the engineer to put on the work a plant requisite to do 100,000 cubic yards per month as he had designated (and which designation he had no power to make by any term of the contract), in order to satisfy him.

This demand was undoubtedly made because he was dissatisfied with the previous work.

But we must not lose sight of the fact that the contract did not compel him to annul. *It merely gave him the option to do* so when he was dissatisfied. And when he exercised that special option without waiting for a specific breach or abandonment, he could not and the court can not now, visit upon the contractors any greater penalty than is specifically set out in the annulment clause of the contract.

And so we come back to the real question at issue. And that question is as to the construction to be placed upon the annulment clause of the contract.

Doctrine of "Anticipatory Breach."

From pages 47 to 63 of the Government's brief is a discussion of the principles of law covering what is known as anticipatory breach. Authorities are cited with great generosity.

This action, as we have heretofore stated, and as is shown specifically by an examination of the complaint herein, is not founded or brought upon any breach of contract, or abandonment of the work, or renunciation of the contract by the contractors, or of expressed intention by them of their unwillingness to perform, or that it was impossible for the contract to have been completed within the time remaining by the terms of the contract. As

admitted, there was nothing in the contract designating how fast the work should be done. The engineer has testified that it could easily have been done in the remaining time, and it actually was done in the eighteen months, which was the time left under the contract.

If there had not been an annulment clause in the contract, as long as the contractors had kept on doing some work in dredging and had not abandoned it, the Government could not legally and rightly have terminated the contract until the time for completion had arrived and the work had not been completed. Until that time the Government could not properly have touched the work.

The power of the engineer is limited by the contract under which he acted. It is stated in the complaint that he acted strictly under the annulment clause. That clause gave him power to annul if the work was not proceeding to his satisfaction. It did not give him any power to exercise his judgment as to how the work *would likely proceed in the future*. There was nothing in the contract to designate the quantity of work in any given time, save the commencement and the completion.

And as we have shown, the reason given for the annulment, and on which it was based, was the failure of the contractor to comply with the unauthorized demand of the engineer to do, in the future, a specific amount of work each month, and even then he annulled the contract a day before the time arrived for the contractors to have started compliance with this unauthorized demand.

This question of anticipatory breach was not raised by the Government on the trial of this action. It was not presented to the Appellate Court. It is raised for the first time on this appeal, in an apparent effort to get away from the real issue raised in this action.

This issue is as to the construction of a specific clause of this contract—the clause upon which it is specifically stated in the complaint, this action is founded.

We submit, even if there was anything in the question of anticipatory breach, that before the Government could raise that question, it would be necessary for the Government to repudiate the present action, brought upon, or under a specific annulment clause of the contract, and to bring an action generally at law for damages upon breach of the contract.

It would be useless to refer to the numerous cases the Government has cited in its brief dealing with the question of anticipatory breach. The court is too well acquainted with that proposition of law and its applicability.

Authorities Distinguished.

Two principal authorities relied on by the plaintiff herein are *United States* v. *Maloney*, 4 App. D. C. 505; *United States* v. *Stone, Sand & Gravel Co.* 177 Fed. 321.

These cases are distinguishable from the case at bar by the statement of Mr. Justice Lacombe on the first appeal herein (p. 80):

"In the Maloney case the contractor wholly failed to do any work whatever; he wholly failed to commence work on or before the 16th day of June, 1901, which he had expressly agreed to do. There was a complete breach of the contract before action was taken under the annulment clause."

There was the same breach in the *Stone, Sand & Gravel Company* case.

Point IV.

Surety Discharged by Change in Contract.

THE SURETY IS DISCHARGED BY THE CHANGE MADE BETWEEN THE PERKINS & O'BRIEN CONTRACT AND THE INTERNATIONAL CONTRACTING COMPANY CONTRACT.

While this brief is submitted on behalf of both the con-

tractors and the surety, we desire the court to appreciate that we represent, in the first instance, the Surety Company in this litigation. And aside from the defenses which are common to both contractors and the surety, the surety had the additional defense that the Government when it made its new contract with the International Contracting Company, changed the contract and thereby released the surety.

The change to which we refer is the change made in the annulment clause by which, in the International Contracting Company contract, the greater liability was placed upon the contractors than in the Perkins & O'Brien contract. And we refer to the case of the *American Bonding Company* v. *United States*, 161 Fed. Rep. 910, heretofore quoted in this brief, and also to the decision of this court in *Miller* v. *Steward*, 9 Wheaton, 680, and in *Reese* v. *United States*, 9 Wall. 13.

Annulment Premature.

We contend here, as we did in the courts below, that the annulment was void for irregularity because it was made at least one day too early. The engineer in charge was here acting upon an extremely drastic clause, giving one party the power at his option to put an end to the contract. Such clauses, while valid, are not regarded with favor by the courts. All the prescribed conditions of the exercise of such a power must be strictly pursued.

In *Philadelphia, Wilmington and Baltimore Railroad* v. *Howard*, 13 How. 307, 340, this court, treating a similar clause in an engineering contract, said:

"The law leans strongly against forfeiture, and it is plainly incumbent on the party who seeks to enforce one, to show plainly his right to it."

A recent able English authority states the rule in very similar language:

"The Courts lean against forfeitures, and as a rule the employer must have a very strong case to obtain the aid of the Courts." (*Macassey & Strahan*, Civil Engineers & Architects, p. 249, under the head of "Power to Determine.")

The engineer officer in charge, Major George W. Goethals, Corps of Engineers, U. S. A., gave the contractors a notice stating in part as follows (Record, p. 31):

"Under authority of the Chief of Engineers, U. S. A., I am authorized to inform you that unless the contractors have on work by January 1st, 1901, a sufficient plant to dredge at least 100,000 cubic yards per month the contract will be annulled."

This notice was followed by an annulment of the contract on the 31st of December, 1900 (Record, p. 33). This was before the expiration of the limit fixed by the engineer himself.

The case is similar to *King* v. *United States*, 37 C. Cls. 428. There the contractor was notified to resume work "with suitable force by the 18th instant" (37 C. Cls. 430). On the very day named in the notice, he appeared on the ground and asked to resume work, but was prevented from going on the ground or working by the officers of the United States; and his contract was, on that date, declared forfeited.

The court said (37 C. Cls. 436, 437):

"It is plain that the defendants, through their officers, were guilty of a breach of contract by excluding the contractor from the work and rescinding or attempting to rescind the contract on the 18th of March. A contracting party can not prevent his contractor from performing and then annul the contract because he has not performed. The case stops with the action of the defendants on the 18th of March. Their subsequent action certainly did not revive any right in themselves. Moreover, the dif-

ferent parts of the contract are to be considered together. The one provision was antagonistic to the other. If the engineer in charge elected to proceed under specification 49, he could not, until the period of notice had expired, turn round and resort to the other provision of the contract. It was equivalent to a notice that while that condition of affairs lasted the engineer in charge would not annul the contract. It is too plain for argument that one party to a contract can not mislead the other and draw him into additional expenses and losses in this way.

"On the 18th of March the contract was not annulled and could not have been; yet on that day the contractor was ousted from the work and prevented from proceeding with it."

Accordingly, the annulment was declared invalid.

The present case is stronger. Here one of the contractors telegraphed the engineer officer on the 29th of December (p. 32), that his representative would call on him. The engineer officer answered on the 31st of December from Newport, R. I., in the vicinity of the work: "Your representative can accomplish nothing by coming here." (p. 33.)

On the same date, December 31, 1900, he wrote and mailed to the contractors and their surety a letter annulling the contract (Record, p. 33).

It is admitted in the testimony of the engineer officer himself (p. 61), that the work was going right on under the contract up to the very day of forfeiture, December 31st, and that 13,406 cubic yards had been excavated in that month. (p. 60, near foot.) By no possibility could the engineer officer know what provision would be made by or on the first of January, especially as he had refused to see a representative of the contractors.

The English Court of Appeal has held that where a contract permits the owner to declare a forfeiture for cessation of work by the builder for fourteen days, a forfeiture

declared after only seven days' cessation of work is void although the builder had become bankrupt (*ex parte Barter*, 26 Chancery Div. 510).

In *Smith* v. *Gordon*, 30 Upper Canada Common Pleas, 553:

"A building contract provided that in case the works were not carried on with such expedition, and with such materials and workmanship as the architect might deem proper, then, with the special and written authority of the proprietor, he should be at liberty, after giving him seven days' notice in writing, to dismiss the contractor, and employ other persons to finish the works, &c.: Held, 1. That such special authority meant an authority to be acted upon with reference to some individual contractor, and not a general power to dismiss at the architect's discretion. 2. That the notice should intimate to the contractor in what respect the architect was dissatisfied, and what he required to be done, so that during the time mentioned in the notice the contractor might have an opportunity of removing the objections, in default of which the architect might dismiss him at the expiration of the time, *but not before*."

In the case at bar the notice gave the contractors the 1st of January, 1901, and the whole of that day. "By" followed by a date means "on or before." *Elizabeth City Cotton Mills* v. *Dunstan*, 27 Southeastern, 1001; 121 N. C. 12; *Blalock* v. *Clark*, 45 Southeastern, 642, 643; 133 N. C. 306; *King* v. *United States*, 37 C. Cls. 428.

Annulment Void Because Government in Default.

The validity of the annulment can not be sustained for another reason. This is, that at the time it took place the Government was itself in default by reason of its failure to comply with the requirements of the contract for monthly payments. The provision of the specifications (Record, p. 9) is as follows:

"34. Payments will be made monthly, when funds are available, ten (10) per cent being reserved until the total amount thus retained is equal to ten (10) per cent of the cost of completing the remainder of the contract as estimated by the engineer officer in charge."

This provision is repeated in the contract proper (Record, p. 15):

"Payments shall be made to the said Perkins and O'Brien monthly, based upon amount of material removed, in the manner especially provided for in the specifications."

The last monthly payment made under these provisions prior to the notice of annulment of December 31, 1900, was on the 17th of July, 1900, for work done in June, 1900. Up to that time the payments had been made at various dates during each month for work done during the preceding month. In the language of Major Goethals (Record, p. 56):

"Payments were made right straight along monthly for any work that had been done during the previous month. The last payment was the 17th of July, 1900, and was for work done in June, 1900."

During the remainder of the calendar year 1900 and up to the date of attempted annulment, the amount and value of the work of the contractors was as follows:

Month.	*Cu. Yds. Dredged.*	*Value.*
September	2,854	$308 23
October	9,607	1,037 56
November		
December	13,406	1,447 85
Board of inspectors (Specifications, Par. 49, R. p. 11. Exact date of this item is not shown)		97 67
Total	25,867	$2,891 31

(Goethals, Record, pp. 56, 57.)

No part of these sums have ever been paid (Goethals, p. 57)

No provisions of an engineering contract are more important or essential to the performance of the work by the contractors than these for monthly partial payments. The principle has been nowhere better stated than by the Court of Appeals of Kentucky in *Henderson Bridge Company* v. *O'Connor*, 88 Ky. 303, 331:

"As appellant was in default in making estimates and paying for work done after November 30, 1883, it had no right to either annul the contract for non-performance or claim the retained percentage. For its right to annul was given upon the condition and faith it would comply with the stipulations on its part; one of the most essential to the contractor being payment according to estimates for the work of each month by the fifteenth of the succeeding one."

The case later came before the court again, and the court thus summarized the provision in question, showing its striking similarity to the one in the present case, and reiterated its previous ruling, 95 Ky. 633, 645, 646:

"The company undertook to annul under that clause of the contract which authorized it arbitrarily done when it appeared to its engineer the work did not progress with sufficient speed or in a proper manner, to be followed by forfeiture of the unpaid part of the value of the work done by the contractors. In the former opinion, however, it was held the forfeiture had been waived and lost. The precise question now is, whether the right to annul without notice existed under another clause which authorized it in case the contractors did not well and truly from time to time comply with and perform all the terms stipulated. As a question of fact, under instructions as to the law applicable, both juries and the special commissioner have found the right to annul at the time and in the manner attempted did not exist. Besides, upon reconsideration, we think that as the company was in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further

comply with and perform all the terms of the contract, it had no right to annul."

This rule is attempted to be overcome by the Assistant Attorney-General in his brief (pp. 85–87), upon three grounds:

1. That as Major Goethals had made up his mind in October to annul the contract, he was justified in not paying the contractors.

2. That the amounts in default were too insignificant to invalidate the power of annulment.

3. That the payments had, in fact, been made so irregularly by the Government during the whole currency of the contract that the provision in question is hardly to be seriously regarded.

Let us consider these in order.

1. The first of them constitutes a serious impeachment of the good faith of the whole proceeding of annulment. The very officer in whose power it lay to annul the contract testifies that about the middle of October when he would ordinarily have paid them for their September work, "I had then made up my mind to annul the contract." (Record, p. 67, quoted in brief for United States, p. 86.)

Here the officer had so far made up his mind to annul the contract that he determined to disregard the provision for monthly payments. Yet after this time he permitted the contractors to go on and do more than $2,000 worth of further work without any intention of paying them for it, as the contract required him to do.

The power of annulment may be waived by the party in whom it is vested; and such waiver may be by acts as well as by words.

"It seems that there will be an implied waiver of the forfeiture not only if the notice to determine be not given

within reasonable time, but if the employer acts in such a manner as to raise an impression that he does not intend to determine the contract; thus permitting the contractor to spend more money in carrying on the contract, or he himself making advances to the contractor under the terms of the contract will operate as a waiver."

Macassey & Strahan, Law of Civil Engineers, etc., p. 258, citing *Marsden* v. *Sambell*, 28 Weekly Reporter, 952 (1880).

The present case is an emphatic instance of waiver of the power to annul by "permitting the contractor to spend more money in carrying on the contract," while neglecting the corresponding duty of making monthly payments.

2. The next attempt to escape the consequence of this violation of the contract by the Government consists in minimizing its importance by pointing to the supposed trifling amounts due. The amount earned in September was at contract rates $308.23; in October $1,037.56; in December $1,447.85. There was also due for board of inspectors under paragraph 49 of the specifications (Record, p. 11) $97.67. (Goethals, Record, pp. 56, 57.) These amounts, even taking only those earned in September and October, were not trifling but substantial sums. Moreover, it was not merely the question of their amount. Contractors with the Government very generally resort to sub-contracts and have the right to secure assistance from those possessed of capital in which they may themselves be lacking. *Hobbs* v. *McLean*, 117 U. S. 567 (a sequel to *United States* v. *Peck*, 102 U. S. 64) presents a striking instance of the successful execution of a $50,000 contract, where the contractor himself furnished only about $100. This was held to be perfectly proper and not prohibited by any statute against the assignment of government contracts or claims. Sub-con-

tractors place great reliance upon the partial payments by the Government. Nothing can be more fatal to the power of a government contractor to secure the necessary assistance which he may require to enable him to carry out his contract than failure of the Government to make the monthly payments. When Major Goethals notified the contractors, December 4, 1900 (Record, pp. 30, 31), how large a plant he required them to place on the work to enable them to avoid a forfeiture, he was himself in default for two months on the partial payments. The very fact that the Government had thus stopped monthly payments might have been, and probably was, the very obstacle which prevented the contractors from increasing their plant to a degree sufficient to satisfy the requirements made by that officer.

The case is thus analogous to *National Machine and Tool Co.* v. *Standard Shoe Machine Company*, 181 Mass. 275 (p. 90 of brief for the U. S.). The case is not one where there might have been a slight underestimate of the monthly payments due or a withholding of a part of of it under some claim of right. It is that of an arbitrary, total cessation of partial payments. It is anything but a slight and immaterial breach.

3. Finally, the Assistant Attorney-General attempts to escape the consequences of the breach of the provision for monthly payments by pointing out (brief for the U. S. p. 92), "that under the practice of the parties the payments under this contract were made most irregularly," etc. In other words, as the Government did not live up to this provision of the contract with any regularity or good faith before, it was justified in discontinuing all attempt to abide by it. We venture to say that no more extraordinary position has ever been taken in regard to the duty of a party under a contract.

The earlier part of the brief for the United States (p.

30–36) is full of arguments in favor of "implied covenants" where such covenants are necessary to help out the case of the United States. In the passage now under discussion the attempt is to read an express covenant out of the contract on the ground that "under the practice of the parties," which really means the practice of the officers of the Government, payments had been made very irregularly.

Some minor points are made in the brief for the United States such as the absence of a demand (Brief, p. 91). There is no evidence to show when a demand was first made, nor was it necessary there should be any. The duty of payment was incumbent upon the Government under the contract (middle p. 15; also par. 34 of Specifications, p. 9). It was the duty of the engineer officer to pay without demand. Moreover, a demand was made by Mr. O'Brien December 13, 1900 (Record, p. 31). This demand is described by counsel for the United States (p. 91) as "incidental" and (p. 92) "casual." In what form it should have been made is not stated.

Besides, such questions are here immaterial. The contractors did not elect to treat the failure to make monthly payments as such a complete breach as to require them to stop their own performance of their part of the contract. They continued at work, notwithstanding the breach. They stood then, and stand now, strictly on the defensive. Their position is that while the Government was thus itself in default, it had no right to annul the contract.

It is also claimed (Brief for the U. S. pp. 91, 92) that the very fact that the contractors kept right on working up to the date of annulment disables them from insisting upon the default in the monthly payments as a ground against the power of annulment. According to this

view, the longer the Government defaulted on the monthly payments and the more diligent the contractors were in keeping at their work, the less ground did the contractors have to contest the annulment. Such a position almost answers itself.

Authorities on Default in Partial Payments.

Let us look now at the authorities on this question of default in the monthly payments as a breach of the contract on the part of the building owner.

In *Canal Company* v. *Gordon*, 6 Wall. 561, there was a stipulation for monthly payments similar to the one involved in the present contract. The estimate for work done in May, not having been paid by the 7th of June, the contractors notified the building owner that they would cease work six days thereafter if the monthly payment was not made. The court said, p. 569:

"We think the fault of the rupture lies wholly with the company. Gordon & Kinyon adhered to the contract, and pursued the work longer than they were bound to do. When they retired they were fully justified, and had a clear equity to be paid a fair compensation for the work they had performed."

In that case the court deemed it a merit on the part of the contractors that they had "pursued the work longer than they were bound to do." Here the fact that the contractors pursued the work after the Government had already defaulted on the partial payments is claimed to deprive them of all right to object to the annulment.

In *Phillips Construction Company* v. *Seymour*, 91 U. S. 646, it appeared that the contractors commenced work under the contract in July, and continued working until some time in December; that the owner failed to pay the amounts due on the monthly estimates for work

done in October and November; and thereupon the contractors abandoned the work and instituted suit. It was held that the breach of the contract was entirely on the part of the owner. The court said, p. 649:

"Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss."

Still more closely in point is *Pidgeon* v. *United States*, 27 C. Cls. 167. The following statement in the opinion, pp. 172, 173, is strikingly similar to the facts in the present case:

"On the 5th of October, 1881, the claimant made application to the officer in charge for the payment of the estimate for labor done during the month of September, which the officer refused to pay, upon the ground that the work was not progressing as it should, and that he would retain not only the per cent but the compensation for the work as an indemnity to the defendants for the faithful performance of the agreement. He was notified by the claimant that without payment he was unable to proceed with the work. The officer also refused to assure claimant that he would be paid for the work he might do in October and November. Whereupon the claimant refused to proceed with the work, and nothing further was done."

The following (pp. 175, 176) shows the view of the court and is the one which we ask to have applied in the present case:

"His condition might have been such, that without monthly payments it was not practicable for him to proceed with the work. He had a right to assume from the inception of the work that he would be paid according to the requirement of the contract; and the failure of the Government to pay justified him in refusing to proceed

on the 5th of October, 1881. Whatever might have been his faults up to that time, the Government having permitted him to proceed, having accepted the performance of the contract during the month of September, and having received the benefit of his labor during that period, it was not in its power to withhold the pay in order that it might be secured against the consequence of a probable or possible failure. The ten per cent which by the terms of the agreement it had the right to retain measures the limit of its power to secure indemnity.

"In the case of *Canal Company* v. *Gordon* (6 Wall. 561), the Supreme Court says, in substance, as given in the syllabus:

"'In a contract to make and complete a structure with agreements for monthly payments, a failure to make a payment at the time specified is a breach, which justifies the abandonment of the work and entitles the contractor to recover a reasonable compensation for the work actually performed. And this notwithstanding a clause in the contract providing for the rate of interest which the deferred payment shall bear in case of failure.'

"It seems to us that the law of this case fully authorized claimant to do what he did upon the failure of the defendants to pay according to the requirement of the contract."

The specific question of the validity of an annulment when declared by a party who is himself in default on monthly payments has been considered by the highest courts, respectively, of Maine and Kentucky. In *Ricker* v. *Fairbanks*, 40 Me. 43, the court said, p. 49:

"Now it is obvious from the situation of the parties, as well as from the whole scope of the contract itself, that it was intended that the 90 per cent stipulated to be paid monthly, should be so applied as to enable the contractor to prosecute and complete the work for which he had contracted. The construction contended for would put it in the power of the corporation to embarrass the contractor by withholding his monthly payments, and then, in case he, by reason of such embarrassment, should fail to pro-

gress with the work with sufficient rapidity, by their engineer to determine that the work had been abandoned, and any balance due the contractor, however, large, forfeited. A construction which should offer so large a premium for wrongdoing should not be adopted unless the language used will admit of no other reasonable explanation."

Even more closely in point is *Henderson Bridge Company* v. *O'Connor*, 88 Ky. 303, 331; 95 Ky. 633, 645, 646. Here the building owner did not pay for any work done after November 30, 1883, and then attempted to annul in February, 1884. The court held that this could not be done. (See quotations, *ante*, p. 56.)

It is also said that these contractors are in no position to treat this default as a defense to the annulment of their contract by the Government, because they did not take advantage of it when it first occurred. The answer is that the default of the Government was a continuing one. It continued right up to the time of annulment. As long as such default continued it was available to the contractors as a defense, even if they elected to overlook it for a time. And even if the contractors overlooked it, the Government could not, while in default, take advantage of their alleged delinquencies and in that way get rid of the contract.

For these reasons it must be concluded that the Government, by defaulting upon the covenant for monthly payments, committed the first breach and, therefore, disabled itself from taking advantage of the provision for annulment. For this reason alone, independently of any other grounds, the annulment must be held invalid.

Conclusion.

For these reasons it is submitted:

1. The position taken by the Circuit Court of Appeals

that the remedy of the Government in case of annulment by act of the engineer was limited to a forfeiture of the retained percentage is clearly correct under the terms of the contract.

2. That whether this is so or not, the engineer had no power to annul both because he did so before the expiration of the period which he had allowed the contractors to supply additional plant and also because he was himself in default upon the monthly payments.

It is therefore submitted that the judgment of the Circuit Court of Appeals should be affirmed.

FREDERIC J. SWIFT,
GEORGE A. KING,
WILLIAM R. CONKLIN,
Counsel for Defendants in Error.